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No. ~~1006~~ 140

IN THE

Supreme Court of the United States

October Term, 1960

SAMUEL RENNY DAMON, HERMAN VON HOLT, DAVID HEBDEN PORTEUS, and JOHN EDWARD RUSSELL, Trustees under the will of SAMUEL M. DAMON, Deceased; LILLIAN TOM LOO; BEATRICE L. LUKE; KAN JUNG LUKE; FERMIN ABUCE; H. K. AHUNA; B. S. AKANA, et al.,

Petitioners,

vs.

Territory of Hawaii by HERBERT Y. C. CHOY, its Attorney General,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

HARRIET BOUSLOG
Bouslog & Symonds
63 Merchant Street
Honolulu, Hawaii
Attorney for Petitioners

MYER C. SYMONDS
Bouslog & Symonds
63 Merchant Street
Honolulu, Hawaii
Of Counsel

APPENDICES

APPENDIX I

CONTENTS

Reference		Page
Note 1:	The names of petitioners	1
Note 2:	Judgment of the Supreme Court of the State of Hawaii dated and entered March 13, 1961	2
	Order Staying Mandate to Trial Court	3
	Opinion of Supreme Court of the State of Hawaii	4
	Opinion on Rehearing	10
Note 3:	Statutory Provisions of the Law of Hawaii Involved	11
Note 4:	Provisions of Petitioners' Leases Relating to Ownership of Buildings, Duration and Rights on Condemnation	13
Note 5:	Provisions of Agreement of Petitioners' Lessors Not to Terminate during Period of Condemnation	14
Note 7:	The Original Complaint Provisions as to the Taking	15
Note 8:	Relevant Excerpts from Petitioners' Answer	17
Note 9:	Relevant text of Order Amending Amended Complaint and Order of Possession and Order	17

APPENDIX I — CONTENTS (Continued)

Note 13: Relevant Excerpts from Territory's Motion for Judgment on the Pleadings 20

Note 14: Relevant Excerpts from Petitioners' Objections and Motion for Summary Judgment on the Issue of Liability 21

Note 15: Petitioners' Specifications of Error on Appeal 22

Note 17: Brief History of the Damon Tract 24

APPENDIX II

OPINIONS IN COMPANION CASE AKANA V. FELIX CIRCUIT JUDGE

42 Hawaii 415, 547, 261 F. (2d) 773

Reference		Page
Note 11:	Opinion and Dissent of Supreme Court of the Territory of Hawaii April 11, 1958	31
	Opinion and Dissent of Supreme Court of the Territory of Hawaii on Motion for an Order Staying Trial of Condemnation and Motion to Dismiss Appeal	73
	Opinion of United States Court of Appeals for the Ninth Circuit	87

NOTE 1

Names of Petitioners

Petitioners, (127 in number) appellants below, are as follows:

J. Amera, M. F. Rofoli, R. Marbelles, V. Magsayo, M. L. Suan, Dego Tina, Levi Charles Maka, Ronald Y. Hirahara, Miyori Ioki, D. Yray, P. M. Yray, J. Nakamoto, K. Nakamoto, N. S. Olaquera, M. Kapada, Fausto Giminez, Angel Puerto, A. A. French, Bernardo Vause, Beulah Jackson, D. A. Keamo, K. Keamo, J. Bardago, N. Bagano, M. Caracol, D. Kukona, J. H. Kanaulu, S. Nakagawa, S. Kineshita, J. Asahina, N. Inouye, J. M. Pacheco, M. P. Pacheco, A. F. Baang, Gran Oriente Filipino Burgos, Leoncio Peros, P. Tampos.

P. M. Alo, L. Fragiao, J. J. Perreira, M. M. Perreira, H. Nakamura, T. Nakamura, T. Nashiro, J. P. Armitage, Kokame Teruya, Wun You, Moses T. Alohikea, K. Yoshimoto, R. Hoshino, W. Hoshino, G. Lobo, M. J. Rezentes, L. G. Rezentes, B. M. Manubi, M. S. Manubi, J. B. Melim, R. M. Melim, E. F. Rocha, M. S. Rocha, J. Corpuz, F. Corpuz, K. J. Tomei, K. Tome, L. Sakamoto, H. S. Konno, S. Kai Wong, L. T. W. Wong, J. L. Bautista, M. M. Nakashima, S. Miyasaki, M. Elizares, J P. Benevides, Jr., J. A. Nunes, L. L. Nunes, F. Soto, L. Napuela.

A. Napuela, Wallace E. Latecki, M. J. Latecki, R. K. Tome, K. Higashi, A. Higashi, W. T. Kawasaki, A. Hamilton, T. Tomihara, D. V. Kaumi, Harold M. Kaneshiro, West La Fortune, H. T. K/ Hee, J. Hee, J. K. Bell, K. H. C. Ching, A. K. Ching, Hung T. Ching, L. L. Nailau, S. S. Dwyer, M. E. Dwyer by James V. Dwyer, Masao Watanabe, E. K. Watanabe, H. K. Leong, S. K. C. Leong, E. G. Handy and G. G. Gurthridge, Paul J. Bellefuille, A. P. Bellefuille, G. Matsuga, M. H. Ohta, M. M. Onaga, D. Onaga, E. P. M. Naipo, M. Hanzawa, Joseph Robello, H. N. Tomikiyo.

K. M. Tomikiyo, Manuel R. Kim, Margaret Kim, Alice Perreira, Richard Perreira, K. F. Everest, B. F. Maxwell, R. W. Maxwell, Sau Moy Lum, L. Tacan, J. Daney, V. K. Quindara, B. S. Akana, Joseph K. Kahoai, J. Bryant, Ellen Riney, Ray Ragasa, A. A. Gonsalves, R. Rennoe, E. Rennoe, C. Coelho, V. M. Renfrow, Ulupiana Luna, Fermin Abuce, Gerald Paraz, Victoriano Quinto, K. Ito, K. Ito, L. Escobido, V. Escobido, S. C. Pascua, P. Suan, C. S. Nazarino, H. K. Ahuna, M. Alanano, E. R. Alanano, I. Borges, H. Nakaoka, P. Orot, B. G. Morales, J. J. Morales, S. B. Akiu, A. Yacas, D. K. Yacas, J. L. Ayers, R. S. Nazarino, M. S. Nazarino, P. Domingo, A. Thomas, G. P. Ganhinin, C. Ganhinin, H. Pacarro, Basilio Olayvar, D. Duhaylongsod, A. Duhaylongsod, and L. Vincent.

NOTE 2

NO. 4100

IN THE SUPREME COURT OF THE STATE OF HAWAII

October Term, 1960

TERRITORY OF HAWAII, by HERBERT Y. C. CHOY, its Attorney General.
Plaintiff-Appellee,

vs.

SAMUEL RENNY DAMON, HERMAN VALDEMAR VON HOLT, DAVID HEBDEN PORTEUS, and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of SAMUEL M. DAMON, deceased, et al.,
Defendants-Appellants.

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of Hawaii filed on September 13, 1960, and the decision denying the petition for rehearing filed on February 20, 1961, the appeal is dismissed and the case is remanded to the circuit court with direction to proceed in accordance with the opinion and the petition for rehearing is denied without argument.

DATED: Honolulu, Hawaii, this 13th day of March, 1961.

BY THE COURT:
LEOTI V. KRONE
Clerk of the Supreme Court

APPROVED:
WILFRED C. TSUKIYAMA
Chief Justice

NOTE 2 (Continued)

NO. 4100

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1960

TERRITORY OF HAWAII, by HERBERT Y. C. CHOY, its Attorney General.
Plaintiff-Appellee,

vs.

SAMUEL RENNY DAMON, HERMAN VALDEMAR VON HOLT, DAVID HEBDEN PORTEUS, and JOHN EDWARD RUSSELL, Trustees under the Will and of the Estate of SAMUEL M. DAMON, deceased, et al.,
Defendants-Appellants.

Civil No. 3234

Appeal from order for judgment on the pleadings, directing the entry of judgment, and denying summary judgment on issue of liability

First Circuit Court
Hon. A. M. Felix, Judge

ORDER STAYING MANDATE

Counsel for defendants-appellants having advised this court of their intention to petition the United States Supreme Court for a Writ of Certiorari in the above entitled cause, and this court having been also advised that counsel for plaintiff-appellee has no objection,

IT IS HEREBY ORDERED that the Mandate herein be and the same is stayed until the further order of the court.

Dated at Honolulu, Hawaii, this 9th day of March, 1961.

WILFRED C. TSUKIYAMA /s/
Chief Justice
Supreme Court, State of Hawaii

(S E A L)

NOTE 2 (Continued)

Opinion of the Supreme Court of the State of Hawaii
September 13, 1960
44 Haw. 577

OPINION OF THE COURT BY MARUMOTO, J.

In connection with the expansion of Honolulu International Airport, the Territory of Hawaii sought to acquire parcels of land in Damon Tract adjacent to the airport originally by condemnation.

Appellants were occupants of certain of the parcels proposed to be condemned under quarterly tenancies which were terminable upon written notice of refusal to extend given by the fee simple owners at least thirty days before the expiration of any of the quarterly terms. They owned the buildings standing on the parcels occupied by them and had the right to remove such buildings upon the expiration of their tenancies.

The Territory named the fee simple owners, as well as appellants, as defendants in the original complaint and also in the two amended complaints which it subsequently filed. It filed the first amended complaint before appellants answered the original complaint. Appellants filed their answer to the first amended complaint after the Territory filed its motion to amend the first amended complaint but before the court granted such motion. They at no time filed their answer to the second amended complaint.

By the original complaint, the Territory proposed to condemn the parcels of land described therein in fee simple absolute and all of its improvements, "excepting those buildings and improvements which certain of the Defendants as lessees, tenants and occupants may have the right and privilege to remove from their respective parcels of land, and appurtenances thereunto belonging." The first amended complaint differed from the original complaint in that it did not except the mentioned buildings and improvements from the scope of the taking. In the second amended complaint, the Territory proposed the condemnation of the described parcels of land "together with all improvements thereon and the reversionary interests of the owners thereof,

excluding therefrom, however, the interests if any, of lessees, tenants or occupants, and the improvements which said persons may own, and/or have the right to remove." In that connection, the Territory alleged:

> "That there are or may be certain persons who may claim some interest as lessees, tenants or occupants and who may have the right to remove certain improvements located on the parcels of land sought to be condemned herein; that Plaintiff does not hereby seek to condemn the interest, if any, of said persons and the improvements said persons may own and/or have the right to remove. The Plaintiff does hereby seek to condemn the herein described parcels of land in fee simple absolute including the reversionary interests of the owners thereof, together with all interests of whatsoever kind and nature, subject to the aforementioned interests, if any."

The court granted the motion of the Territory to amend the first amended complaint over appellants' objection. Appellants filed a notice of appeal from the order granting the motion.

While such notice of appeal was outstanding, the Territory filed a motion for judgment on the pleadings against appellants. Appellants in turn filed their return in opposition to the motion and also moved for summary judgment on the issue of liability and for other relief. The court then entered its ORDER FOR JUDGMENT ON THE PLEADINGS, in which it (a) ordered that judgment be entered against appellants finding that they were not entitled to compensation or damages, inasmuch as the pleadings affirmatively showed that no interest of appellants was being condemned; (b) expressly directed the clerk "to make entry of this final judgment in accordance with Rule 58 of the Hawaii Rules of Civil Procedure," upon an express determination that there was no just reason for delay; (c) ordered that the judgment be without prejudice to any claim for damages that appellants might have under R.L.H. 1955, § 8-25; and (d) denied appellants' motion for summary judgment on the issue of liability.

Aside from filing the court's order for judgment on the pleadings, the clerk did not enter a judgment as directed

in the order. Appellants filed a notice of appeal "from the order granting plaintiff judgment on the pleadings" and "from the order denying defendant appellants' motion for summary judgment on the issue of liability" and for other relief. Simultaneously with the filing of such notice of appeal, appellants, with the approval of the court, dismissed their appeal from the order granting the motion of the Territory to amend the first amended complaint. At the time of such dismissal, the prior appeal had not been docketed in this court. The later appeal was docketed within the time limited in H.R.C.P., Rule 73(g). Thus, the appeal presently before us is this later appeal from the order for judgment on the pleadings.

Appellants sought a reversal of the order appealed from on the ground that the court erred in entering the order on the premise that their interest was not being condemned. They contended that their interest was in fact being condemned, despite the allegation in the second amended complaint to the contrary, for the reason that when land is condemned, the buildings on the land are included in the scope of the taking, even in a situation where the land and the buildings are separately owned and by agreement the owners of the buildings have the right to remove them, inasmuch as the word "land," as used in connection with condemnation, includes the buildings and the inherent nature of land cannot be changed by private agreement. They further contended that the attempt of the Territory to exclude the buildings from the scope of the taking by including the allegation to that effect in the second amended complaint was nugatory, even if it were permissible to condemn the land only and not the buildings thereon, because the instant proceeding was instituted pursuant to a resolution of the Hawaii Aeronautics Commission which requested the attorney general to condemn the "lands" necessary for the expansion of Honolulu International Airport and, in the absence of a specific request by the commission to do so, the attorney general was without authority to exclude the buildings.

It might also be stated that although appellants did not attack the order appealed from on any jurisdictional ground, there existed a very serious question regarding the jurisdiction of the circuit court to enter such order. At the time

of the entry of the order for judgment on the pleadings, the notice of appeal from the order granting the motion of the Territory to amend the first amended complaint was outstanding. The order allowing the amendment was obviously nonappealable, for allowance of amendments is within the discretion of the trial court and is not subject to appellate review except for abuse, and in this case there was a holding of this court that the circuit court had not abused its discretion. *Application of Akana for Writ of Mandamus*, 42 Haw. 415, aff'd *Akana* v. *Felix*, 261 F. 2d 773. Nevertheless, the filing of the notice of appeal from that order posed the question as to whether the circuit court had jurisdiction to entertain and act on the motion of the Territory for judgment on the pleadings while such notice was in effect. The general rule is that the filing of a notice of appeal divests the trial court of jurisdiction over the appealed case. Where such a rule is applicable, a subsequent dismissal of the appeal should not have the effect of validating an order which was *coram non judice* at its inception.

Also present in the case were other questions casting some doubt on the validity of the order appealed from and the validity of this appeal from a procedural standpoint. The question regarding the validity of the order was posed by the fact that the order was entered upon a motion for judgment on the pleadings which was prematurely filed. H.R.C.P., Rule 12 (c), provides for the filing of such motion "after the pleadings are closed." The Territory filed the motion before appellants filed any responsive pleading to the second amended complaint and therefore before the pleadings were closed. As to the question regarding the validity of this appeal, it existed because the appeal was taken from the order for judgment on the pleadings and it was questionable whether the order was a "judgment," as defined in H.R.C.P., Rule 54 (a). Appeals must be taken from judgments, not from decisions or orders to enter judgments. Here the order provided that "judgment be entered against the defendants hereinafter named on the pleadings" and that "the Clerk is expressly directed to make entry of this final judgment in accordance with Rule 58 of Hawaii Rules of Civil Procedure." Under H.R.C.P., Rule 58, "The filing of the judgment in the office of the clerk constitutes the entry of the judgment." The clerk filed the order but

took no other action to comply with the direction for the entry of judgment.

However, this appeal may properly be disposed of without considering the ground of reversal urged by appellants or the jurisdictional and procedural questions mentioned in the preceding paragraphs, for the appeal was rendered moot after it was docketed in this court by the filing by the Territory of a discontinuance of the condemnation proceeding. This court may not decide moot questions or abstract propositions of law. See *California* v. *San Pablo and Tulare Railroad Co.*, 149 U.S. 308; *United States* v. *Alaska Steamship Co.*, 253 U.S. 113; *Barker Painting Co.* v. *Painters Union*, 281 U.S. 462; *Chandler* v. *Wise*, 307 U.S. 474.

The discontinuance was filed in the circuit court and was allowed by that court with the consent of the fee simple owners. Appellants argue that the discontinuance was nugatory because the circuit court allowed it when it was without jurisdiction over the condemnation proceeding by reason of the pendency of the present appeal, and, further, because, even if the court had jurisdiction over the proceeding, it allowed the discontinuance without notice to them, in violation of H.R.C.P., Rule 41 (a) (2).

The present appeal was taken from an order which purportedly was a final judgment under H.R.C.P., Rule 54 (b), upon one of multiple claims. We think that when an appeal is taken from such judgment, the trial court is divested of jurisdiction with respect to the claim as to which the judgment was entered but it retains jurisdiction over the remainder of the case.

Such being the case, the circuit court was without jurisdiction to allow the discontinuance of the condemnation proceeding as against appellants. But the court retained jurisdiction over the proceeding vis-a-vis the Territory and the fee simple owners, and the allowance of the discontinuance terminated the proceeding as between those parties.

The termination of the condemnation proceeding as between the Territory and the fee simple owners meant that there was no condemnation of the parcels of land on which appellants' buildings stood. The fact that there was no condemnation of such land meant, in turn, that appellants were henceforth without any basis for claiming compensation for the buildings as for property taken in condemna-

tion. Appellants' entire case depended upon the condemnation of the land, their position being that a condemnation of land necessarily included a taking of the buildings thereon because buildings came within the definition of land.

There is no provision in our statute which requires a condemner to prosecute a condemnation proceeding to final judgment. The right of a condemner to abandon a pending proceeding is implicit in R.L.H. 1955, § 8-25, which provides:

> "Whenever any proceedings instituted under the provisions of this part are abandoned or discontinued before reaching a final judgment, or if, for any cause, the property concerned is not finally taken for public use, a defendant who would have been entitled to compensation or damages had such property been finally taken, shall be entitled, in such proceedings, to recover from the plaintiff all such damage as may have been sustained by him by reason of the bringing of the proceedings and the possession by the plaintiff of the property concerned if such possession had been awarded including his costs of court, a reasonable amount to cover attorney's fees paid by him in connection therewith, and other reasonable expenses; and the possession of the property concerned shall be restored to the defendant entitled thereto. Issues of fact arising in connection with any claim for such damage shall be tried by the court without a jury unless a trial by jury shall be demanded by either party, pursuant to the provisions of section 231-6, within ten days from the date of the entry of an order or judgment allowing the discontinuance of the proceedings, or dismissing the proceedings or denying the right of the plaintiff to take the property concerned for public use."

Thus, after the discontinuance of the condemnation proceeding as between the Territory and the fee simple owners, appellants' only recourse was to proceed under R.L.H. 1955, § 8-25, to recover any damages which they might have sustained by reason of the bringing of the proceeding. Within ten days after the circuit court entered its order allowing the discontinuance as filed by the Territory, appellants filed their demand for jury trial in that court. It might be that the demand was so filed in abundance of caution. At the time of such filing, the condemnation proceeding as between

the Territory and appellants was pending in this court and had not been terminated by the discontinuance filed by the Territory in the circuit court.

The case will be remanded to the circuit court to permit appellants to proceed to recover any damage to which they might be entitled under R.L.H. 1955, § 8-25, and in the proceeding to recover such damage, the demand for jury trial previously filed by appellants in that court shall be recognized as being properly filed in accordance with the statute.

Appeal is dismissed and the case is remanded to the circuit court with direction to proceed in accordance with this opinion.

Harriet Bouslog (*Bouslog & Symonds* on the briefs) for certain defendants-appellants.

Andrew S. O. Lee and *Walter T. Shimoda*, Deputy Attorneys General (*Jack H. Mizuha*, Attorney General, *John P. Russell*, Special Deputy Attorney General, and *Andrew S. O. Lee* on the brief), for plaintiff-appellee.

Opinion of the Supreme Court of the State of Hawaii denying rehearing, February 20, 1961
44 Haw. 642

Per Curiam. This court has had under advisement the petition for rehearing filed by appellants.

In view of the fact that a circuit judge was assigned by reason of a vacancy created by the resignation of a former justice of this court and the author of the opinion, subsequent to the decision rendered in the above-entitled cause, the substitute judge was afforded liberal time to examine and study the briefs and extended record on appeal. The petition before us was given careful consideration and discussed by the full court at a series of conferences.

We find that the petition does not contain any matter of substance which was not taken into consideration heretofore in arriving at the court's decision. Accordingly, the petition is denied without argument.

Bouslog & Symonds for the petition.

WILFRED C. TSUKIYAMA /s/
CHAS. E. CASSIDY /s/
CABLE A. WIRTZ /s/
FRANK A. McKINLEY /s/
RONALD B. JAMIESON /s/

NOTE 3

Statutory Provisions of Law of Hawaii Involved
Chapter 8 Revised Laws of Hawaii, 1955, as Amended, Part I

Sec. 8-10. Procedure as in Civil Actions. Except as otherwise provided in this part, the procedure shall be the same as in other civil actions.

. . . .

Sec. 8-12. Plaintiff. The attorney general of the Territory may, at the request of the head of any department of the Territory, or as otherwise provided by law, institute proceedings for the condemnation of property as provided for in this part . . .

Sec. 8-13. Complaint Defendants. Actions under and by virtue of this part, shall be commenced by filing a complaint and issuing a summons thereon. All persons who are owners or claimants of the property sought to be condemned shall be joined as defendants . . .

Sec. 8-14. Complaint Additional contents; map. The complaint shall also contain a statement of the use to which the land sought to be condemned is to be put, a description of each and every piece of land sought to be condemned, and whether the same includes the whole or only a part of an entire tract or parcel. A map shall accompany the complaint which shall correctly delineate the land sought to be condemned and its location.

. . . .

Sec. 8-17. Amendments of complaints, citations. In all proceedings under this part the court shall have power at any stage of the proceedings to allow amendments in form or substance in a complaint, citation, summons, process, answer, motion, order, verdict, judgment or other proceeding, including amendment in the description of land sought to be condemned, whenever such amendments will not impair the substantial rights of any party in interest.

. . . .

Sec. 8-20. Decision. The court shall have power to determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the same.

Sec. 8-21. Damages Assessed, how. In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned with all improvements thereon shall be assessed, and if any of the improvements are separately owned, the value shall be separately assessed . . .

Sec. 8-22. Assessed as at day of summons. For the purpose of assessing compensation and damages, the right thereto shall

be deemed to have accrued at the date of summons, and its actual value at that date shall be the measure of valuation of all property to be condemned, and the basis of damage to property by reason of its severance from the portion sought to be condemned, subject, however, to the provisions of Section 8-21.

No improvements put on the property subsequent to the date of service of the summons shall be included in the assessment of compensation.

. . . .

Sec. 8-24. Final Order of Condemnation. When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of such condemnation, a certified copy of which shall be filed and recorded in the office of the registrar of conveyances and thereupon the property described shall vest in the plaintiff.

Sec. 8-25. Defendant Allowed Damages upon abandonment or dismissal of proceedings. Whenever any proceedings instituted under the provisions of this part are abandoned or discontinued before reaching a final judgment, or if, for any cause, the property is not finally taken for public use, a defendant who would have been entitled to compensation or damages had such property been finally taken, shall be entitled in such proceedings to recover from the plaintiff all such damage as may have been sustained by him by reason of the bringing of the proceedings and the possession by the plaintiff of the property concerned if such possession has been awarded including his costs of court, a reasonable amount to cover attorneys fees paid by him in connection therewith, and other reasonable expenses; and the possession of property shall be restored to the defendant entitled thereto. . . .

. . . .

Sec. 8-27. Possession Pending action alternative procedure. Where the plaintiff is the Territory or any county the following alternative procedure may be followed: At any time after the commencement of an action pursuant to this part, the Territory or any county may file a motion for an order of possession invoking this section and supported by an affidavit alleging or by oral evidence prima facie showing (a) the right of the Territory or county to maintain the action (b) the public use for which the real property sought to be condemned is being taken, and (c) the sum of money estimated by the Territory or the county to be just compensation or damages for the taking of such real property. Upon such motion and upon the payment of such estimated sum of money to the clerk of the court for the use of the persons entitled thereto, the court shall issue an order ex parte putting the Territory or county in possession of the real property sought to be condemned and permitting the Territory or county to do such work thereon as may be required

for the purpose for which the taking of the property is sought. Such order placing the Territory or county in possession shall become effective upon the expiration of ten days after service thereof, provided that for good cause shown within the ten days, the court may vacate or modify the order or postpone the effective date thereof for an additional period of time. Service of the order shall be made personally on those defendants who are in actual possession, and in other cases may be made by depositing a copy thereof in a United States post office, postage prepaid, registered mail, addressed to such defendants at their last known addresses, or to their attorneys of record.

Sec. 8-28. Order of Possession. No order of possession shall issue unless the plaintiff shall have paid to the clerk of the court issuing the order for the use of the persons entitled thereto, the amount of the estimated compensation or damages, stated in the motion for the issuance of such order. . . .

Sec. 8-29. Upon the application of the parties entitled thereto the court may order that the amount of the estimated compensation or damages stated in such motion and paid to the clerk of the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceedings. . . . A payment to any party as aforesaid shall be held to constitute an abandonment by such party of all defenses interposed by him, excepting his claim for greater compensation or damages.

NOTE 4

Provisions of Petitioners' Leases Relating to Ownership of Buildings, Duration, and Rights on Condemnation

Condemnation and Compensation. (1) That if at any time during the continuance hereof said premises or any part thereof shall be taken or condemned for any public use by any authority having the power of eminent domain, then and in every such case the estate and interest of the Lessee in the premises so taken shall at once cease and determine, and the Lessee shall not by reason of such taking be entitled to any claim against the Lessors or others for compensation or indemnity for leasehold interest or for the taking of any land or improvements thereon *other than improvements erected by* the Lessee, and all compensation payable or to be paid by reason thereof shall be payable to and be the sole property of the Lessors, and the Lessee shall have no interest in or claim to such compensation or any part thereof whatsoever; *and that such compensation as shall represent the value of any improvements erected by the Lessee on said premises shall be payable to the Lessee;* [Italics supplied]

Rights of Extension*. (3) That if the Lessee shall at all

times during the continuance hereof promptly pay when due the rent herein reserved and faithfully observe and perform all the covenants of the Lessee herein contained, the Lessee shall have the right to extend this lease beyond the term hereby demised for one or more successive periods of three (3) months each, at the same rate of rent and upon the same conditions herein contained, by paying to the Lessors at the office of Bishop Trust Company, Limited, on or before the date of commencement of each such period of extension the quarterly installment of rent therefor; provided, however, that said right of the Lessee shall not be effective to extend this lease if the Lessors shall give written notice to the Lessee of their refusal of extension at least thirty (30) days prior to the expiration of said term or any extension thereof.

End of Term. (13) That at the end of said term or last extension thereof or sooner determination of this lease he will peaceably deliver up to the Lessors possession of said premises in good repair and condition; provided, however, that if the Lessee shall not be in default hereunder he may then remove the buildings standing thereon, making good all repairs for damage cased by said removal.

* Under this extension provision the original term of most lessees which had begun in 1952 or 1953 had been extended and the lease was in force on the date of summons, September 13, 1957, as of which the right to compensation accrues and is assessed.

NOTE 5

Provision of Agreement of Petitioners' Lessors Not to Terminate during Period of Condemnation

This Agreement entered into this 14th day of February, 1957, effective as of January 31, 1957, by and Between Kaloaloa Neighborhood Association, hereinafter called "KNA" and Kan Jung Luke and Lillian Tom Loo, hereinafter called "Lessors," of Honolulu, City and County of Honolulu, Territory of Hawaii,

WITNESSETH THAT:

WHEREAS, KNA is acting in behalf of a group of lessees (hereinafter called Lessees) who have indicated their desire to be represented by KNA in working out a compromise agreement of disputes and differences between themselves and Lessors, and have accepted the negotiated compromise,

which said Lessees presently have one year written leases which have been extended for quarterly period, covering the demised land located at Kaloaloa Acres, commonly known as Damon Tract, in Honolulu aforesaid, said written leases being hereinafter referred to as "Leases"; and

. . . .

NOW, THEREFORE, in consideration of the premises and mutual promises and agreements herein contained the parties hereto promise and agree as follows:

. . . .

8. Lessors will make no claim for the houses and/or other improvements placed upon the demised premises by Lessees in the event of condemnation by any government authority, provided that Lessees shall not be delinquent in the payment of any rent, taxes or water charges, nor have breached any of the terms, conditions and covenants specified in said Leases, at the time of such condemnation; nor shall Lessors terminate said Leases during the period of such condemnation unless the Lessees are delinquent as aforesaid.

. . . .

KALOALOA NEIGHBORHOOD ASSOCIATION
By George Roberts
Its President

By John Peoples
Its Compromise Committee Chairman

s/ Kan Jung Luke
s/ Lillian Tom Loo

NOTE 7

Provisions of the Original condemnation Complaint filed September 13, 1957

COMPLAINT

Comes now the TERRITORY OF HAWAII, Plaintiff, by its Attorney General, Herbert Y. C. Choy, by and at the request of the Hawaii Aeronautics Commission, and alleges as follows:

I

That this action is brought in the exercise of Plaintiff's power of Eminent Domain to condemn land for a public

purpose under Chapters 8 and 15 of the Revised Laws of Hawaii 1955, and under Act 18, Item 1 of the Special Session Laws of Hawaii 1949, and Act 273, Item 1(a) of the Session Laws of Hawaii 1955.

II

That a resolution of the Hawaii Aeronautics Commission authorizing the bringing of this section is attached hereto and made a part hereof as Plaintiff's Exhibit "B."

III

That the land herein sought to be condemned, is situate at Moanalua, Honolulu, Oahu, Territory of Hawaii, and is a portion of that certain area of land commonly known as the Damon Tract, all being portions of the land noted on Transfer Cetificate of Title 20266, Land Court Application 1074.

IV

That more particularly set forth hereinbelow are the parcels of land sought to be condemned, described by Tax Map designations, Land Court Lot Numbers and Map Numbers, including the area of each parcel and names of persons joined as Defendants herein who may claim some interest as lessees, tenants and occupants:

[Here naming petitioners and identifying the land leased by them]

. . . .

Comprising a Total Land Area of 69.784 Acres.

V

That certain of the Defendants named herein as lessees, tenants and occupants in the above Paragraph IV may have the right and privilege to remove certain buildings and improvements located on their respective parcels on which they may be lessees, tenants and occupants. The Territory of Hawaii, Plaintiff, does not seek to condemn either the right and privilege of removal or the buildings and improvements which may be so removed.

. . . .

NOTE 8

Relevant Excerpts of Petitioners' Answer

ANSWER OF NAMED DEFENDANTS TO AMENDED COMPLAINT*

The defendants herein named in answer to the amended complaint in the above entitled cause say:

I

They admit the allegations contained in paragraphs I, II, III, V, VI, VII, and VIII.

II

Answering paragraph V of the amended complaint the defendants named in the First Affirmative Defense state they are the owners of an interest in the realty sought to be condemned in that they are the owners of the improvements located on and attached to said realty on the date of the filing of the complaint herein and on the date the Territory of Hawaii took possession of said land and improvements, and are entitled to just compensation based upon the fair market value for the taking of their said improvements under the Fifth Amendment to the Constitution of the United States and the laws of the Territory of Hawaii.

* It is noted in the opinion of the Supreme Court of the State of Hawaii that no answer was filed to the second amended complaint. The second amended complaint was not filed until after Judgment on the Pleadings was entered by the trial court against petitioners. But even if petitioners were at fault in not answering the order amending the second complaint, the punishment of being deprived of the constitutional right to compensation for property taken scarcely fits the crime.

NOTE 9

Relevant excerpts from Order Amending Amended Complaint and Amending Order Putting Plaintiff in Possession

The above Motion was heard by the Honorable Albert M. Felix, presiding Judge of the above-entitled Court, on Fri-

day, January 17, 1958, at 8:30 A.M., and good cause appearing for granting of the Motion;

IT IS HEREBY ORDERED that said Motion be and is hereby granted and the Amended Complaint and Amended Order Putting Plaintiff in Possession are amended as follows:

I

AS TO THE AMENDED COMPLAINT:

. . . .

c. By adding another paragraph as Paragraph IX, to read:

"That there are or may be certain persons who may claim some interest as lessees, tenants or occupants and who may have the right to remove certain improvements located on the parcels of land sought to be condemned herein; that Plaintiff does not hereby seek to condemn the interest, if any, of said persons and the improvements said persons may own and/or have the right to remove. The Plaintiff does hereby seek to condemn the herein described parcels of land in fee simple absolute including the reversionary interests of the owners thereof, together with all interests of whatsoever kind and nature, subject to the aforementioned interests, if any."

d. Under the Prayer, page 12:

(i) by deleting in its entirety Paragraph "1" and inserting in lieu thereof the following language:

"1. The Court adjudge that the public purpose herein alleged requires the acquisition of the above-described land by Plaintiff in fee simple absolute, together with all improvements thereon and the reversionary interests of the owners thereof, excluding therefrom, however, the interests, if any, of lessees, tenants or occupants, and the improvements which said persons may own, and/or have the right to remove."

(ii) by deleting all of Paragraph "2" and inserting in lieu thereof the following language:

"2. The Court determine any and all claims adverse or conflicting to the said land and improvements sought to be condemned herein, including the amount of com-

pensation or damages, if any, to be awarded for the taking, and to whom such compensation is to be paid."

(iii) by deleting all of Paragraph "3" and inserting in lieu thereof the following language:

"3. Upon payment of the award to the clerk of this Court, this Court vest title to said land in Plaintiff, in fee simple absolute, together with all improvements thereof, and the reversionary interests of the owners thereof, excluding therefrom, however, the interests, if any, of lessees, tenants or occupants, and the improvements which said persons may own, and/or have the right to remove, by final order of condemnation."

II

AS TO THE AMENDED ORDER PUTTING PLAINTIFF IN POSSESSION:

a. By deleting the whole of subparagraph "(i)" and inserting in lieu thereof the following language:

"(i) together with all improvements thereon and the reversionary interests of the owners thereof, excluding therefrom, however, the interests, if any, of lessees, tenants, or occupants and the improvements which said persons may own and/or have the right to remove; and"

b. By deleting in its entirety subparagraph "a" of the Order on page 2, and inserting in lieu thereof the following language:

"a. That subject to the rights, if any, of holdover tenancies of tenants or their respective assigns, Plaintiff be and is hereby put in possession of all of the parcels of land herein sought to be condemned, and more particularly set forth hereinbelow with the right to collect all the rent from the holdover tenants, or their respective assigns."

NOTE 13

MOTION FOR JUDGMENT ON THE PLEADINGS

The Plaintiff, Territory of Hawaii, under Rule 12(c) of the Hawaii Rules of Civil Procedure, moves this Honorable Court for judgment on the pleadings as to the defendants hereinafter named *finding said defendants are entitled to no compensation or damages,* on the ground that the pleadings herein affirmatively *show that no* interest of said *defendants* is being condemned and therefore said defendants have no claim for damages by reason of the condemnation herein sought.

And, further, Plaintiff moves that this Honorable Court, pursuant to Rule 54(b), herein make an express determination *that there is no just reason for delay and expressly direct the entry of judgment against the said defendants on the ground that this court has ordered a separate trial against said defendants under Rule 42(b) of the Hawaii Rules of Civil Procedure.*

Defendants affected by this motion are:

[Here naming petitioners]

This motion is based upon the record herein and upon the decision of the Supreme Court of the Territory of Hawaii dated April 11, 1958 in the mandamus proceeding "In re Bessie S. Akana et al.", No. 4066.

DATED: Honolulu, Hawaii, May 27, 1958.

TERRITORY OF HAWAII, Plaintiff
By HAROLD W. NICKELSEN
Assistant Attorney General
Its Attorney [Italics supplied]

NOTE 14

Defendant Improvement Owners' Return in Opposition to Plaintiff's Motion for Judgment on the Pleadings and Motion for Summary Judgment that Defendants' Ownership of Improvements on the Land Being Condemned Constitutes an Interest in Land for which They are Entitled to Compensation

The defendants represented by BOUSLOG & SYMONDS against whom plaintiff has moved for judgment on the pleadings, by way of return in opposition to the plaintiff's motion, allege:

1. Plaintiff is not entitled to a judgment on the pleadings "finding said defendants are entitled to no compensation or damages" for the reason it is apparent from the face of the pleadings, that said defendants are the owners of the improvements located on the land being condemned, their improvements are attached to and a part of the land, and their ownership thereof constitutes an interest in the land which is destroyed by the taking of the land, and hence that compensation must be paid therefor by reason of the provisions of the Fifth Amendment to the Constitution of the United States that no property shall be taken for public purposes without the payment of just compensation.

2. The plaintiff, while purporting to exclude defendants' leasehold interest and their rights under existing leases to remove their improvements, has in fact taken said leaseholds and interest of said defendants and has assumed to exercise the rights of lessors under said lease by giving notice of termination of said lease to defendants as is shown by a copy of a notice of termination of lease attached hereto and marked Exhibit "A" which plaintiff caused to be sent to all defendants against whom it seeks summary judgment on or about March 28, 1958.

3. Defendants' ownership of the improvements for which they seek compensation did not arise, as alleged by the plaintiff, under existing leaseholds but was conferred in leases executed many years ago by defendants or their predecessors in interest and carried forward in subsequent leases, including the present short term leases, and the rights of

defendants cannot be determined from plaintiff's assertions that defendants are lessees who have only rights to remove their improvements, said short term leases and former leases not being a part of the pleadings herein.

4. Even if it be determined that defendants are not entitled to compensation for their improvements as they stand on the land, and defendants can be required by plaintiff to remove their said improvements, they nevertheless would be entitled to compensation for the difference between the value of the improvements as they stand on the land and their value when severed from the land, and hence plaintiff is not entitled to judgment on the pleadings.

Defendants, pursuant to the provisions of Rule 12(c) and Rule 56 of the Hawaii Rules of Civil Procedure, move for summary judgment on the issue of liability holding that their ownership of the improvements on the land being condemned, being admitted by the Territory and not being controverted by the landowners, constitutes an interest in land which entitles them to compensation to be determined by a jury.

NOTE 15

Excerpts from Petitioners' Specifications of Error in Supreme Court of Hawaii

1. The trial court erred in entering its order of February 19, 1958, permitting the Territory to amend its complaint to purport to exclude appellants' improvements from the scope of the taking, and based thereon, entering its order of June 12, 1958, for the reasons that the Territory could not constitutionally take the realty and evade paying compensation for the improvements by the device of exclusion because they are part of the realty and because the Territory was not entitled to a judgment on the pleadings finding appellants entitled to no compensation or damages because it appeared from the face of the pleadings and facts before the trial court, that appellants are the owners of the improvements located on, attached to and a part of the land being condemned, and hence that compensation must be

paid appellants for their improvements by reason of the provisions of the Fifth Amendment to the Constitution of the United States that no property shall be taken for public purposes without the payment of just compensation.

2. The trial court erroneously entered judgment for the Territory for the reason that it appeared from facts before the trial court that the Territory, while purporting to exclude appellants' leasehold interest and their rights thereunder to remove their improvements, had in fact taken appellants' leaseholds and had assumed to exercise the rights of lessors thereunder by giving notice of termination under the terms of said lease and directing appellants to exercise their privilege under said leases to remove their improvements or forfeit them to the Territory.

3. The trial court erred in granting judgment for the Territory in that it appeared from the facts before the trial court that appellants' ownership of the improvements for which they sought compensation did not arise, as alleged by the Territory, under existing leaseholds but was conferred in leases executed many years ago by appellants or their predecessors in interest and carried forward in subsequent leases, and that the rights of appellants could not be determined from the Territory's assertions that appellants were lessees who have only rights to remove their improvements, but had to be determined as questions of fact, not law.

4. The trial court erred in granting judgment for the Territory for even if appellants were determined not to be entitled to compensation for their improvements as they stood on the land and could be required to remove them, they nevertheless would be entitled to compensation for the difference between the value of the improvements as they stood on the land and their value when severed from the land.

NOTE 17

BRIEF HISTORY OF DAMON TRACT

The Damon Tract comprises 233 of the eight thousand acres of the ahupua of the Moanalua which was devised by an heiress of Hawaiian Crown land to S. M. Damon who preserved it in trust for his progeny. In about 1937 the Tract was withdrawn from sugar production and leased to town laborers in one acre house lots. By 1950 the City of Honolulu had expanded so the Damon Tract was surrounded by industrial areas of Honolulu, Honolulu International Airport and federal military establishments. The original acre lots had been divided into half and even quarter acre lots, sold off and developed by purchasers of portions of the lease—with homes. Beginning about 1950, the Trustees developed plans to subdivide the land into city lots, promising lessees long term leases of smaller lots upon subdivision, but in the meantime offering one year leases with automatic extensions until the completion of subdivision plans. In early 1956 the Estate announced a new subdivision with publicly given assurances that present tenants would have first refusal of land they occupied. This announcement was followed almost immediately by an announcement that the 233 acre Damon Tract had been sold under agreement of sale to Kan Jung Luke and Lillian Loo, subject to the tenancies of lessees, for a total of four million five hundred thousand dollars ($4,500,000) with one hundred thousand dollars ($100,000) down, and the balance payable in 1981,* with interest payable currently. The increased lease rentals allowed the purchasers substantial margin of profit over expenses, and thus enabled them to purchase at lessees' expense. Lessees petitioned the Territory to condemn the whole Damon Tract, it being apparent it was needed for airport expansion and that the fair market value, if condemnation were begun immediately, had been fixed by the sale. Failing in the efforts to spur territorial action, the lessees resisted the lease rent increases, asserting that the leases in effect were interim leases which were to govern until they were tendered the long

term leases promised by the Estate on which they had relied in maintaining and improving their land. Test eviction cases, after several months of trial, resulted in a compromise settlement in which, among other things, the purchasers agreed not to terminate existing tenancies during any period of condemnation.

On September 13, 1957, the Territory filed suit to condemn 62 of the 233 acres. The negotiated price it paid the purchasers who had paid in cash little more than twenty-five thousand dollars ($25,000) on a proportionate basis, was approximately five million dollars ($5,000,000). At the same time the Territory at first offered nothing, then one dollar ($1.00), then again nothing, to the lessees who owned the buildings on the land which it valued at $327,077 for taxation and who had warned the Territory in their petition of July 10, 1956, that unless the Territory condemned the land then, the taxpayers would also be victims of the purchasers when they demanded double or triple profits on condemnation.

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* If portions were sold off or condemned purchasers could secure transfers of those portions upon payment of fifty cents per square foot of the portions of which transfer was sought.

APPENDIX II

APPENDIX II

OPINIONS IN COMPANION CASE
AKANA V. FELIX CIRCUIT JUDGE
42 Hawaii 415, 547, 261 F. (2d) 773

Reference		Page
Note 11:	Opinion and Dissent of Supreme Court of the Territory of Hawaii April 11, 1958	31
	Opinion and Dissent of Supreme Court of the Territory of Hawaii on Motion for an Order Staying Trial of Condemnation and Motion to Dismiss Appeal	73
	Opinion of United States Court of Appeals for the Ninth Circuit	87

IN THE MATTER OF THE APPLICATION OF BESSIE S. AKANA, A DEFENDANT IN CIVIL NO. 3234, TERRITORY OF HAWAII v. SAMUEL RENNY DAMON, HERMAN VALDEMAR VON HOLT, DAVID HEBDEN PORTEUS, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED, ET AL., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, FOR A WRIT OF MANDAMUS DIRECTED TO ALBERT M. FELIX, THIRD JUDGE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

No. 4066.

PETITION FOR WRIT OF MANDAMUS.

ARGUED MARCH 10, 1958. DECIDED APRIL 11, 1958.

RICE, C. J., STAINBACK AND MARUMOTO, JJ.

MANDAMUS—*when issued—discretion of trial judge.*

Where there is a discretion in the trial judge, this court will not by mandamus interfere with the exercise of such discretion.

SAME—*same—same.*

Extent of the applicability of *Fong* v. *Kapienza*, 39 Haw. 79, is not considered because in this case the trial judge did not abuse his discretion in allowing the amendment to the complaint.

EMINENT DOMAIN—*complaint—exclusion from taking.*

A condemner may take a fee simple estate or any lesser estate, and thus may exclude a leasehold or other interest from the scope of the taking, in eminent domain. (R. L. H. 1955, § 8-5.)

Opinion of the Court.

SAME—*same—amendment.*

Complaint in an eminent domain proceeding may be amended at any stage of the proceeding whenever such amendment does not impair the substantial rights of any party in interest. (R. L. H. 1955, § 8-17)

SAME—*same—same.*

Where a condemner originally included, in the scope of the taking, the interests of the tenants of portions of the land sought to be condemned, and later, by amendment to the complaint, excluded such interests from the scope of the taking, such exclusion does not impair the substantial rights of the tenants, for the tenants may assert against the condemner the rights which they could have asserted against the owner of the land before the taking.

SAME—*abandonment.*

An eminent domain proceeding may be abandoned at any time before reaching final judgment.

SAME—*same—partial abandonment.*

An eminent domain proceeding may be abandoned partially.

SAME—*same—after order of possession.*

An eminent domain proceeding may be abandoned after the entry of order putting condemner in possession. (R. L. H. 1955, § 8-25)

SAME—*same—damages.*

Where an interest is included in the scope of the taking in an eminent domain proceeding and the proceeding is later abandoned as to such interest, the owner of the interest so abandoned may have redress for damages caused by such abandonment but is not entitled to an award of compensation for such interest. (R. L. H. 1955, § 8-25)

SAME—*when title passes.*

Title to the land or interest taken in an eminent domain proceeding vests when a final order of condemnation is entered. (R. L. H. 1955, § 8-24)

SAME—*stipulation in lease regarding apportionment of compensation between landlord and tenant.*

A clause in a lease which provides that upon condemnation all compensation representing value of improvements erected by lessee shall be payable to lessee is only a provision for the apportionment of compensation between the lessors and the lessee when the condemner takes the leasehold interest and becomes subject to the payment of just compensation for such improvements, and does not apply where the leasehold interest is excluded from the taking.

OPINION OF THE COURT BY MARUMOTO, J.

This is a petition for mandamus filed by Bessie S. Akana, on behalf of herself and certain tenants of Damon Tract similarly situated. Bessie S. Akana and other persons similarly situated will be referred to in this opinion as petitioners.

The petitioners are tenants of portions of the land sought to be condemned by the Territory of Hawaii for the expansion of the Honolulu International Airport in an eminent domain proceeding filed in the circuit court of the first circuit, entitled, "Territory of Hawaii, by Herbert Y. C. Choy, its Attorney General, Plaintiff, v. Samuel Renny Damon, et al., Defendants," being Civil No. 3234 of the records of the court. Each of the petitioners held a one-year lease from the Trustees under the Will and of the Estate of Samuel M. Damon, Deceased, but at the time of the commencement of the eminent domain proceeding the original term had expired and had been succeeded by a quarterly tenancy. Each lease provided that upon the expiration of the original term the lessee shall have the right to one or more successive quarterly extensions, such right to be terminable upon written notice of refusal of extension given by the lessors to the lessee at least thirty days before the expiration of the original term or the extended term; that upon the determination of the lease, the lessee may remove the buildings standing on the premises; that if the premises should be taken or condemned by lawful authority, then the interest of the lessee in the premises shall cease; that the lessee shall not by reason of such taking be entitled to any claim against the lessors or others for compensation for the leasehold interest or for the taking of any land or improvements thereon other than improvements erected by the lessee; and that all compensation representing the value of the improvements erected by the lessee shall be payable to the lessee.

The Territory filed its original complaint in Civil No. 3234 on September 13, 1957, in which it joined the Trustees of Damon Estate, fee simple owners of the land sought to be condemned, Lillian Tom Loo and Kan Jung Luke, purchasers of such land under an agreement of sale with the Trustees of Damon Estate, Beatrice L. Luke, wife of

Kan Jung Luke, and certain of the petitioners, as defendants. It sought to condemn 69.784 acres of land, particularly described in the complaint, but not the right and privilege of the petitioners to remove the buildings on the land or the buildings and improvements which they are entitled to remove. On September 20, 1957, the Territory obtained an order putting it in possession of the land, "together with all property rights of whatsoever nature and improvements thereon, excepting therefrom those certain buildings and improvements," which the petitioners had the right and privilege to remove.

On October 23, 1957, the Territory filed a motion to amend the complaint by including, within the scope of the taking, the land and all improvements thereon and to amend the order putting it in possession by conforming it to the amended complaint. On October 26, 1957, the Honorable Albert M. Felix, the presiding judge, entered an order allowing the motion.

On October 31, 1957, the presiding judge entered an amended order putting plaintiff in possession, which provided:

> "That, excepting for those parcels occupied by defendants represented by HARRIET BOUSLOG, Esq., Plaintiff above named be and is hereby put in possession of all of the parcels of land herein sought to be condemned and more particularly set forth hereinbelow, together with all improvements thereon, and with the right to collect all the rent from the lessees, tenants and occupants of said parcels, provided, that if Defendants Kan Jung Luke, Lillian Tom Loo and Beatrice L. Luke are eventually found to be entitled to such rent, then an appropriate item to that effect shall be included in the Judgment to be entered herein, and the Plaintiff is hereby granted the right to do such work thereon as may be required for the expansion of

the Honolulu International Airport, City and County of Honolulu, Territory of Hawaii."

Lillian Tom Loo, Kan Jung Luke and Beatrice L. Luke filed their answer to the amended complaint on November 7, 1957. On November 12, 1957, they filed a motion for a separate trial. The presiding judge allowed the motion and entered his order for separate trial on December 24, 1957.

On January 13, 1958, the Territory filed a further motion to amend its complaint and to amend the order putting it in possession. The portions of the amendment to the complaint, material to the proceeding before this court, described the property sought to be condemned as "the land and improvements thereon" instead of "the land and all improvements thereon," and added a new paragraph reading as follows:

> "That there are or may be certain persons who may claim some interest as lessees, tenants or occupants and who may have the right to remove certain improvements located on the parcels of land sought to be condemned herein; that Plaintiff does not hereby seek to condemn the interest, if any, of said persons and the improvements said persons may own and/or have the right to remove. The Plaintiff does hereby seek to condemn the herein described parcels of land in fee simple absolute including the reversionary interests of the owners thereof, together with all interests of whatsoever kind and nature, subject to the aforementioned interests, if any."

The portion of the amendment to the order putting the Territory in possession, material to this proceeding, substituted for the paragraph in the amended order putting plaintiff in possession entered on October 31, 1957, and quoted above, the following paragraph:

> "That subject to the rights, if any, of holdover

tenancies of tenants or their respective assigns, Plaintiff be and is hereby put in possession of all of the parcels of land herein sought to be condemned, and more particularly set forth hereinbelow with the right to collect all the rent from the holdover tenants, or their respective assigns."

The presiding judge granted the motion on February 19, 1958.

The petitioners allege in their petition that the presiding judge set March 3, 1958, at 9 o'clock in the morning as the date and time of trial for the determination of compensation to the owners of the land on which the improvements of the petitioners stand. The Territory denied this allegation and has alleged that the judge has set April 17, 1958, at 9 o'clock in the morning as the date and time for such trial.

In their petition, the petitioners seek a writ of mandamus from this court directing the Honorable Albert M. Felix:

1. To vacate his order fixing March 3, 1958, as the date of trial of the interests of Lillian Tom Loo, Kan Jung Luke and Beatrice L. Luke and to hold in abeyance the setting of a new trial date until the determination of the issues raised by the petition;

2. To vacate his order of February 19, 1958, amending the complaint and the order putting the Territory in possession insofar as it authorizes the striking, from the amended complaint and order of possession, of the improvements belonging to the petitioners which are affixed to and a part of the realty covered by the order of possession, and

3. To vacate his order directing a separate trial of the interests of Lillian Tom Loo, Kan Jung Luke and Beatrice L. Luke.

The petitioners base their petition on the language of

R. L. H. 1955, § 236-2, relating to mandamus. The petitioners take the position that in entering the orders complained of, the presiding judge committed a flagrant abuse of judicial discretion in disregard of their legal rights and that this court may properly intervene by mandamus to prevent a denial of justice.

With the exception of *Fong* v. *Sapienza*, 39 Haw. 79, this court has held consistently that where there is a discretion in the trial judge, the exercise of such discretion may not be interfered with by mandamus. (*Matter of Waterhouse*, 2 Haw. 241; *Spreckels* v. *Circuit Judge*, 10 Haw. 198; *Collector of Customs* v. *Circuit Judge*, 12 Haw. 99; *Matter of Schmidt*, 13 Haw. 332; *Scott* v. *Stuart*, 22 Haw. 576; *Matter of Tactacan*, 42 Haw. 141)

In *Fong* v. *Sapienza*, a majority of this court held that mandamus may issue where there is a showing of manifest abuse of discretion resulting in a denial of justice on the authority of the following quotation in *Collector of Customs* v. *Circuit Judge*, *supra*, from *Virginia* v. *Rives*, 100 U. S. 323: "In what case such a writ is warranted by the principles and usages of law, it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion, except when that discretion has been abused." But the dissenting justice in that case pointed out that the majority quoted from *Virginia* v. *Rives* out of context and failed to quote the following statement that immediately followed: "* * * but it is a remedy when the case is outside of the exercise of this discretion, and *outside of the jurisdiction of the court or officer to which or to whom the writ is addressed.*" (Emphasis supplied) The precise holding in *Virginia* v. *Rives* is that mandamus should issue because the court to

which it was directed had not acquired jurisdiction of the case. *Collector of Customs* v. *Circuit Judge* itself does not stand for the proposition quoted by the majority because there mandamus was denied.

In *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, the Supreme Court of the United States held that the reference by a district judge to a master of the trial of antitrust cases amounted to little less than an abdication of his judicial function, depriving the parties of a trial before the court of the basic issues involved in the litigation, and therefore an abuse of judicial discretion, and affirmed the judgment of the court of appeals in issuing writs of mandamus to the district judge to vacate his order of reference.

Here we are not presented with a case of abdication of judicial function as in the *La Buy* case. Nor do we need to consider the extent of the applicability of *Fong* v. *Sapienza*, for we do not see any abuse of discretion on the part of the trial judge.

For a full understanding of the petitioners' position that the presiding judge committed a flagrant abuse of judicial discretion, it is necessary to understand the meaning of the various steps thus far taken by the Territory in the eminent domain proceeding.

The Territory filed its complaint in order to acquire the land necessary for the expansion of the Honolulu International Airport. In acquiring such land, the Territory is, in a sense, acting as trustee for the public. (*Emerson* v. *City of Somerville*, 166 Mass. 115, 117, 44 N. E. 110, 112) It is duty bound to acquire the land at the least possible cost to the public, consistent with the right of the owners to just compensation. For the expansion of the airport, the Territory eventually requires the entire interest in the land, but not the buildings which the petitioners have the right to remove. Thus, originally, the Territory sought to take the entire interest in the land but not the right and

privilege of the petitioners to remove the buildings or the buildings which were subject to such right and privilege. Apparently, the Territory saw some legal difficulty in taking the land, apart from the buildings. So, it next sought to take the entire interest in the land, including the buildings. But it did not have immediate need of the portions of the land on which the buildings stood. It, therefore, agreed to the entry of an order putting it in possession by the terms of which the portions of the land subject to the tenancies of the petitioners were excluded. The Territory, apparently considered, upon further study, that if it took the entire interest in the land, it could not require the petitioners to remove the buildings and that it would be saddled with the buildings for which it had no use and for which it would be required to pay. So, it amended the complaint to exclude from the scope of the taking the petitioners' interests in the land and the buildings which the petitioners may own and have the right to remove. The difference between the original complaint and the complaint as finally amended is that in the original complaint the Territory excluded from the scope of the taking the buildings which the petitioners may own and have the right and privilege to remove, while in the complaint as finally amended it excluded the petitioners' interests in the land, as well as such buildings. By the last amendment, the Territory sought to place itself in precisely the same position as the fee simple owners with respect to the petitioners. The fee simple owners may terminate the petitioners' existing tenancies in the land by giving to the petitioners written notices of refusal to extend at least thirty days before the expiration of such tenancies. Upon such termination, the petitioners may remove the buildings which they had erected but may not compel the fee simple owners to take over and pay for such buildings.

The petitioners insist that the Territory may not put

itself in the position of the fee simple owners, and that, if it takes the land, it must take, and pay just compensation for, the buildings thereon because buildings are an integral part of the land under the established principles of real property law.

The petitioners' position poses the following question: Where a condemner needs a tract of land for public use and is confronted with the following situation:

(a) portions of the land are subject to quarterly tenancies;

(b) the tenancies are terminable on thirty days' notice;

(c) the tenants have the right to remove the buildings standing on the portions of the land that they occupy upon the termination of their tenancies;

(d) the condemner eventually requires the entire interest in the land free and clear of the tenancies but not the buildings which the tenants have the right to remove;

(e) the condemner does not require the land until the existing tenancies are duly terminated; and

(f) the condemner does not require the removal of the buildings until a reasonable time has elapsed after the due termination of the tenancies,

may the condemner take a reversionary interest in such tract, that is, a fee simple title subject to the existing tenancies and the tenants' right of removal of the buildings; or, if it takes the land, must it at the same time take the buildings that it does not require and pay just compensation therefor to the tenants?

The first part of the question may be divided further into the following two questions:

1. Could the Territory originally have excluded from the scope of the taking the petitioners' interests, as quarterly tenants, in the land, and the buildings which the

petitioners own and have the right to remove?

2. If the answer to the above question is in the affirmative, may the Territory exclude such interests and buildings after having once included them in the scope of the taking?

The answer to the question as to whether the Territory originally could have excluded the petitioners' interests in the land, and the buildings which the petitioners own and have the right to remove, is found in R. L. H. 1955, § 8-5, which provides that, in the taking of private property for public use, the condemner may acquire a fee simple estate or any lesser estate. A fee simple estate subject to an existing tenancy is a lesser estate than a fee simple estate.

The Federal statutes relating to condemnation also provide for the taking of an estate less than fee simple. Section 258a of Title 40 of the United States Code provides that upon the filing of a declaration of taking and the deposit in court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in the declaration, the title to the land in fee simple absolute, or such less estate or interest therein as specified in the declaration, shall vest in the United States.

There is no precedent of this court which has construed our statute. The Federal statute has been construed in *New York Telephone Co.* v. *United States*, 136 F. (2d) 87, and *United States* v. *Tavares Construction Co.*, 175 F. (2d) 379.

In *New York Telephone Co.* v. *United States*, the government filed a declaration of taking of the fee simple title to the land subject to existing public utility easements. The telephone company had such easements in the condemned land, but it was not joined as a party to the proceeding. So, it filed a notice of appearance and claim for compensation. The government moved to strike the

notice and claim. The district court granted the motion. The court of appeals affirmed the order of the district court on the ground that, since the rights of the telephone company were excluded from the taking, it had no standing as a party in the proceeding.

In *United States* v. *Tavares Construction Co.*, one of the parcels taken was subject to a lease and a portion of the parcel, described as the "site," was subject to a sublease. The sublessee had an option from the lessee to purchase the site and the facilities and machinery thereon upon the expiration of the sublease. The government, by a declaration of taking, took the parcel in fee simple absolute, except the right, title and interest of the lessee, including all improvements and fixtures located thereon or in any way appertaining thereto. The court held that, because of such exception in the declaration of taking, the interest of the sublessee in the site and its option to purchase the site and the facilities and machinery thereon were not condemned, such interest and option being derived through the lessee, and that the sublessee was not entitled to any compensation in the proceeding.

Thus, the cases stand for the proposition that where an estate less than fee simple is taken, as authorized by statute, the owner of the interest that has been excluded from the taking is not entitled to compensation in the condemnation proceeding.

With regard to the question as to whether the Territory may exclude the petitioners' interests in the land and the buildings which the petitioners own and have the right to remove, after it once included them in the scope of the taking, the answer to that question is also found in our statutes.

An exclusion of an interest from the scope of the taking is an abandonment of the proceeding as to such interest. Although we do not have a statute which specifically au-

thorizes abandonment, such authority is implicit in R. L. H. 1955, § 8-25, which allows damages upon abandonment of proceeding "before reaching a final judgment."

It has been held that a statute providing that an eminent domain proceeding may not be discontinued after confirmation of the verdict clearly recognizes the right of discontinuance before confirmation of the verdict. (*In re Board of Education of City of Detroit*, 242 Mich. 658, 219 N. W. 614) By the same reasoning, a statute which allows damages upon abandonment of a proceeding before the entry of a final judgment implies an authorization to discontinue before final judgment.

Where abandonment is authorized, such abandonment may be partial, not only as to area but also as to interest. (*Johnson & Wimsatt, Inc.* v. *Reichelderfer*, 66 F. [2d] 217; *People* v. *Superior Court of Los Angeles County*, 47 Cal. App. [2d] 292, 118 P. [2d] 47, aff'd 120 P. [2d] 655; *In re Mt. Vernon Ave. in City of New York*, 102 N. Y. S. 159; *Tacoma Eastern R. Co.* v. *Smithgall*, 58 Wash. 445, 108 P. 1091)

Entry of an order of possession under R. L. H. 1955, § 8-27, is not a bar to the exercise of authority to abandon. But the authority must be exercised before the entry of final judgment. That also is implicit in R. L. H. 1955, § 8-25, which provides that whenever a proceeding is abandoned before reaching final judgment "the possession of the property concerned shall be restored to the defendant entitled thereto."

As construed in *United States* v. *Sunset Cemetery Co.*, 132 F. (2d) 163, the Federal law does not permit abandonment after the filing of declaration of taking. In that case, the cemetery company had a drainage easement across the condemned land. In its declaration of taking, the government declared that the estate taken "is in fee simple absolute, subject to outstanding permanent

easements for highway purposes." It did not exclude the drainage easement. Later the government moved to amend the declaration of taking so as to exclude the drainage easement. Over the objection of the cemetery company the district court granted the motion and dismissed the cemetery company from the proceeding. The cemetery company appealed on the ground that, upon the filing of the declaration of taking, the government was immediately vested with the title to the drainage easement; that the title thus acquired could not be taken from the government except by its own authorized alienation; that the court was without authority to permit the amendment to the declaration of taking so as to exclude anything already seized; and that by the original declaration the rights of both parties were fixed and could not thereafter be altered. The court of appeals sustained the appeal and reversed the judgment of the district court. In so doing, the court stated: "Clearly under provisions of the statute, condemnation is effected and title completely vested in the Government by the mere filing of a declaration of taking and a judgment adjudging title in the United States is wholly unnecessary. Such is the statutory mandate. It follows that from and after the vesting of title, the Government can be divested only by virtue of appropriate congressional authorization and not by an amended taking."

The holding in *United States* v. *Sunset Cemetery Co.* is based on the fact that under the Federal statutes, title to the land sought to be taken passes to the government immediately upon the filing of a declaration of taking. It does not apply to a proceeding under our statute where title to the property or interest taken vests in the condemner not by the filing of the complaint, nor by the entry of an order of possession, but only upon the entry of the final order of condemnation. R. L. H. 1955, § 8-24, provides: "When all payments required by the final judg-

ment have been made, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of such condemnation, a certified copy of which shall be filed and recorded in the office of the registrar of conveyances, and thereupon the property described shall vest in the plaintiff."

The petitioners argue that, even if the Territory may take less than a fee simple estate, it may not take land apart from the buildings, that if it takes the land it must necessarily take and pay for the buildings because the legal definition of land includes the buildings thereon. They rely on Nichols on Eminent Domain, 3d Ed., § 5.81 [2], where it is stated:

> "It frequently happens that, in the case of a lease for a long term of years, the tenant erects buildings upon the leased land or puts fixtures into the buildings for his own use. It is well settled that, even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property, and, in the absence of a special agreement to the contrary, may be removed by the tenant at any time during the continuation of the lease provided such removal may be made without injury to the freehold. This rule is, however, entirely for the protection of the tenant and cannot be invoked by the condemning party. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant."

They also cite cases which hold that, where a condemner takes land which is subject to leases under which the lessees have the right to remove the buildings thereon, the lessees are entitled to just compensation for the buildings

and may not be relegated to their right of removal.

An examination of the cases on which the statement in Nichols on Eminent Domain is based shows that such statement applies only in a situation where the entire interest in the land, including the leasehold, is taken, not where the leasehold is excluded from the taking. The same may be said of the cases cited by the petitioners.

The petitioners do not discuss or state the facts of the cases that they cite. They merely quote excerpts of opinions in such cases. The quotations are plausible, if they are read out of their context. But they are delusive unless they are considered in the proper context of the facts to which they relate. Illustrative of the type of cases cited by the petitioners are *United States* v. *Seagren*, 50 F. (2d) 333 and *Burkhart* v. *United States*, 227 F. (2d) 659.

Both *United States* v. *Seagren* and *Burkhart* v. *United States* are cases in which the leasehold interests under which the tenants had the right to remove the buildings were not excluded and were prematurely terminated by the taking. That the court, in the *Seagren* case, had in mind a situation in which the leasehold was taken, and not a situation in which the leasehold was excluded, is evident from the following question that it posed: "The question thus becomes whether or not this private stipulation for removal between the landlord and the tenant inures to the benefit of the government *when condemning the estates of both?*" (Emphasis supplied) In the *Burkhart* case, fee simple title to "the lands with all buildings and improvements thereon and all appurtenances thereto" was taken. The declaration of taking excepted "existing easements for public roads and highways, for public utilities, for railroads and pipe lines, and with respect to Tracts Q-1115 and Q-1117, subject also to rights and interests of the Columbia Irrigation District, except any and all assessments thereby." No mention was made of the exclusion

of the leasehold in question. The court said: "In view of the language of the statute, it was incumbent upon the government to designate expressly the interest less than fee simple title or the exceptions thereto by excluding the leasehold or fixtures and structures, if that were desired."

The extent to which the Federal courts will go where there is an exclusion of an interest from the scope of the taking is shown in *New York Telephone Co.* v. *United States, supra.* There the government took a fee simple title to the land required for the development of aviation facilities at Floyd Bennett Field in Brooklyn "subject to existing public utility easements." The telephone company, which was not joined by the government as a party to the proceeding, filed a notice of appearance and a claim for compensation, alleging that for many years before the institution of the condemnation proceeding it had owned, maintained and operated within the limits of the condemned property certain necessary fixtures and equipment consisting of underground ducts, cables, manholes and appurtenances; that upon the acquisition of title to the condemned land (Parcel No. 1) the "petitioner-plaintiff demanded and procured the immediate possession thereof to the uses and purposes of this proceeding, and the claimant, upon like demand of said petitioner-plaintiff, and subsequent to the date of said acquisition herein of said Parcel No. 1 accordingly removed" certain of its manhole covers, ducts and cables; and that such removal rendered valueless its entire "Flatbush Avenue-Neponset Underground and Submarine Telephone Line," which extended beyond Parcel No. 1, and necessitated relocating its entire lines on substituted routes. It further alleged that the fair and reasonable value of its physical property located within Parcel No. 1 was estimated to be $28,271, and the damage, less estimated realized salvage, suffered as a result of the necessary relocation of its lines was

$68,300. The district court granted the government's motion to strike the notice of appearance and claim as insufficient in law. In affirming the order of the district court, the court of appeals stated:

"The question presented lies within a very narrow compass. The proceeding rests upon a declaration of taking signed by the acting Secretary of the Navy. Upon the filing of such a declaration and the deposit in the court of the estimated compensation, title to the lands 'in fee simple absolute, or such less estate or interest therein as is specified in said declaration' vests in the United States. 40 U.S.C.A. § 258a. In the case at bar the declaration specified that the estate taken 'is in fee simple, subject to existing public utility easements, if any.' The judgment of condemnation likewise provided that the title taken was 'subject to existing public utility easements.' It seems obvious that the rights and physical equipment of the Telephone Company were excluded from the condemnation. The appellant's argument that the lack of specific description of the existing public utility easements vitiates their exclusion is not persuasive; nor has authority been cited which supports it. Certainly the 'subject to' phrase in the declaration of taking and the petition in condemnation was enough to give notice to the appellant that its easements were not being taken and that the compensation deposited in the court had not been estimated with reference to them. Moreover, as counsel for the United States points out, the reverse procedure of taking fee simple title in the first instance and later excluding utility easements which will not interfere with the governmental project would give rise to difficulties. See United States v. Sunset Cemetery Corp., 7 Cir., 132 F. 2d 163; United States v. 16,572 Acres of Land, D.C.S.D. Tex., 45 F. Supp. 23. Since

the appellant's rights were not condemned, no compensation can be awarded in this proceeding and consequently its notice of appearance and claim were properly stricken.

"It is urged that under the circumstances alleged in the claim, namely, the appellant's removal of its equipment upon demand of the United States, it is fictional to say that its property was not taken. But the Government's liability for compensation to be awarded herein is limited by the statute authorizing the proceeding. Cf. United States v. Shingle, 9 Cir., 91 F. 2d 85, 89, certiorari denied, 302 U.S. 746, 58 S. Ct. 264, 82 L.Ed. 577; Kanakanui v. United States, 9 Cir., 244 F. 923; Carlisle v. Cooper, 2 Cir., 64 F. 472. There is no suggestion that the declaration of taking has been amended. Without that the allowance of compensation herein would be unauthorized. This is not to say that the appellant is without remedy. If the unnamed governmental agent to whose demand the Telephone Company yielded was authorized to make such demand it may be that a claim for the property appropriated can be successfully prosecuted in the Court of Claims, or, if the demand was unauthorized, that the agent may be compelled to respond in damages personally. Cf. United States v. North American Transp. & Trading Co., 253 U. S. 330, 40 S.Ct. 518, 64 L.Ed. 935. But these are questions which do not arise in the present proceeding and could not be determined on the present record."

The petitioners also refer to *Jackson* v. *State*, 213 N. Y. 34, 106 N. E. 758. That case involved a taking of a warehouse which contained machinery, shafting, elevators and conveyors. These articles were so annexed to the land, and the purpose of the annexation was such, that as between vendor and vendee they would have constituted fixtures.

SUPREME COURT OF HAWAII.

Opinion of the Court.

The court, in an opinion written by Judge Cardozo, held that the board of claims erred in disallowing compensation for the enhancement of value of the warehouse due to the presence of these fixtures. The petitioners quote a portion of the opinion which states:

> "It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of secondhand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value."

Omitted from the quotation is the following statement which immediately follows:

> "An appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures, and so it has frequently been held. * * * We say 'unless qualified when made,' because we do not need at this time to decide whether the state, in giving notice of appropriation, may except fixtures that would retain, after severance from the soil, a substantial value as personalty, and thus restrict the payment to the difference between the value of the detached articles and the value added to the building when they were used in connection with it. * * * If that may be done in any case, it can only be when the purpose is made plain in the act of appropriation. The rights of the parties became fixed at that time, and must then be reciprocal. If the state has the right, under a general notice of appropriation, to insist that title to the fixtures has passed to it with the land, the owner has the correla-

tive right to insist upon payment. The law does not leave the title in a state of suspense. The value of the fixtures ought, therefore, to have been considered in estimating the total value of the property appropriated by the state."

From the foregoing statement, it is apparent that *Jackson* v. *State* also applies only to a case of unqualified taking.

At this point, we shall advert to the clause in the lease which provides that upon condemnation all compensation representing the value of the improvements erected by the lessee shall be payable to the lessee. That is only a provision for the apportionment of compensation between the lessors and the lessee when the condemner takes the leasehold interest and becomes subject to the payment of just compensation for such improvements, and does not apply where the leasehold interest is excluded from the taking.

The Territory proceeded to exclude the petitioners' interests in the land, and the buildings which the petitioners have the right to remove, from the scope of the taking, by an amendment to the complaint. The motion for amendment was filed before trial and, therefore, well within the time permitted by our statute for abandonment. Under Hawaii Rules of Civil Procedure, the allowance of amendment is within the sound discretion of the court. Under rule 81 (b), the rules apply to eminent domain proceedings "except insofar as and to the extent that they are inconsistent with specific statutes of the Territory relating to such proceedings." R. L. H. 1955, § 8-17, provides: "In all proceedings under this part the court shall have power at any stage of the proceeding to allow amendments in form or substance in any complaint, citation, summons, process, answer, motion, order, verdict, judgment or other proceeding, including amendment in the description of the lands sought to be condemned, whenever such amendment will not impair the substantial rights of any party in interest."

The Territory's last amendment is an amendment in substance but it does not impair the substantial rights of the petitioners. By the taking under the amended complaint, the Territory will take the place of the fee simple owners of the land sought to be taken. After the taking the petitioners may assert against the Territory the same rights that they are entitled to assert against the fee simple owners before the taking. The petitioners' rights are not diminished in any way by the taking of the fee simple title subject to their interests in the land and the buildings which they own and have the right to remove. They undoubtedly have incurred expenses by reason of the previous inclusion of their interests in the scope of the taking. For the recovery of such expenses, they may have recourse to R. L. H. 1955, § 8-25.

There is no principle of law which prohibits fee simple owners from selling lands subject to existing encumbrances, including leases or other tenancies, regardless of whether the purchasers are private parties without the power of eminent domain or governmental bodies or other entities invested with the power of eminent domain. If the Territory and the fee simple owners of the land in question had agreed on the amount of just compensation for the latters' interest in such land, the normal procedure would have been for such owners to convey the land subject to the petitioners' existing tenancies therein. The petitioners would have had no legal basis for preventing such conveyance. Upon such conveyance, the Territory would have acquired a fee simple title in the land subject to such tenancies. Such result would have been no different from the position of the Territory under its last amendment to the complaint.

If the petitioners' position that, in an eminent domain proceeding, the Territory may not put itself in the position of the fee simple owners with respect to the petition-

ers represents the law, such law gives a windfall to the petitioners at the expense of the public merely by the fortuitous circumstance of the Territory and the fee simple owners failing to agree on the amount of just compensation. That is, assuming that the amount of just compensation that the petitioners will obtain for the buildings in the eminent domain proceeding is greater than the value of the buildings to them or the prices for which the buildings can be sold. Such is not the law.

In *Emerson* v. *City of Somerville*, *supra*, the petitioner claimed damages for the taking of the buildings on land required by the city for a public park. The city acquired the land by accepting an offer of the fee simple owner to sell, not by a taking in eminent domain. The petitioner claimed ownership of the buildings. Assuming that the petitioner owned the buildings and the city took the land with notice of such ownership, under the Massachusetts law, he was only a tenant at will of the land and was subject to the owner's right to convert his tenancy into a tenancy at sufferance by a conveyance, as well as to end it by three months' notice. After the conveyance of the land by the fee simple owners, the city gave the petitioner three months' notice to remove the buildings. Before the expiration of the three-month period the buildings were destroyed by fire and the petitioner collected insurance on them as his own. The court held that the petitioner was not entitled to damages. In so holding, Justice Holmes, for the court stated:

> "What else has the petitioner suffered? His occupancy has been ended after an allowance of all the time to which, in any aspect, he was entitled. That is all. Surely, this is not something for which the city must indemnify him. Some rights of an owner it has over land which it has bought and paid for, although as a trustee, for the public; and some of these

rights it may exercise without paying a second time, even under the stricter of our diverging lines of decisions. If it were otherwise, we do not see why it would not be equally the duty of the city to pay if it gave a notice to quit at the end of one, ten, or a hundred years. So that the statute practically would have enlarged the petitioner's estate by a gift out of the pockets of others. We do not so read its intent."

It may be noted that in *Emerson* v. *City of Somerville*, the petitioner had collected the insurance on the buildings when they burned. However, the opinion makes it clear that the holding of the court does not depend on that circumstance.

In the consideration of any eminent domain proceeding, we are guided by two lodestars. On the one hand, there is the injunction in the Fifth Amendment of the Constitution that private property shall not be taken for public use without just compensation. On the other hand, the constitutional injunction shall not avail as a shield for the squandering of public funds under the pretext of just compensation. A person must not be placed in a worse position than before by the compulsory taking of his property. But neither is he entitled to be placed in a better position. The prime question that we must have in our mind is: What has the person lost by the taking? Not, what has the condemner gained? (*Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195)

The petitioners lost nothing by the allowance of the last amendment to the complaint. Their property is not taken. The Territory amended the complaint because it decided not to take the petitioners' property. Anomalously, the petitioners complain because their property is not taken. They do not complain that the taking of the fee simple title, subject to their interests, places them in a worse position than before the taking. They complain that the allow-

ance of the amendment takes away from them the right to just compensation for the buildings which they could have claimed if the Territory proceeded to take the entire interest in the land in accordance with the complaint as first amended on October 26, 1957. Neither the requirement of just compensation under the Fifth Amendment nor the provisions of our statutes governing eminent domain proceedings prevent the Territory from withdrawing, before the right became vested in the petitioners, any advantage which it unwittingly gave them.

The presiding judge properly allowed the amendment. After the allowance of the amendment, the petitioners are not concerned with the trial of the issues relating to the compensation for the taking of the fee simple title, subject to their interests, and they are not deprived of any of their rights by a separate trial granted to Lillian Tom Loo, Kan Jung Luke and Beatrice L. Luke.

The petition for a writ of mandamus is denied.

Harriet Bouslog (*Bouslog & Symonds* on the brief) for petitioner, for the application for writ of mandamus.

John P. Russell, Special Deputy Attorney General (*Harold W. Nickelsen*, Assistant Attorney General, on memorandum in opposition to issuance of writ) for the Territory.

J. Garner Anthony (*Robertson, Castle & Anthony* and *Chuck Mau* [*Mau, Hong & Kanemoto*] on memorandum in opposition to issuance of writ and for motion to dismiss) for Lillian Tom Loo, Beatrice L. Luke and Kan Jung Luke.

DISSENTING OPINION OF STAINBACK, J.

I cannot agree with the opinion of the majority as expressed herein.

This is a suit in eminent domain brought pursuant to the resolution of the Hawaii Aeronautics Commission as follows:

"RESOLVED (1) that the public necessity requires the condemnation for public use, namely, for Honolulu International Airport expansion, of *the lands* of the Damon Tract adjacent to the airport, delineated on the map on this table; (2) that the Territory proceed immediately with condemnation proceedings of the *said land* so needed; (3) that the Attorney General be requested to institute suit for such purpose." (Emphasis added.)

The facts relative to the various pleadings, motions, amendments and other proceedings that have taken place in the court below are set forth in the majority opinion.

That "the lands of the Damon Tract" include the improvements thereon—erected before the expiration of long-term leases—and that the Territory in taking such is liable to the owners thereof is elementary law. The rights to compensation "accrued at the date of summons." (R. L. H. 1955, c. 8, § 22.)

"A condemnation proceeding is an action in rem. It is not the taking of rights of designated persons, but *the taking of the property itself.* Duckett & Co. v. United States, 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. ed. 216." (*Eagle Lake Improvement Co.* v. *United States*, 160 F. [2d] 182, 184.)

The proceeding takes the land including all improvements thereon and the question of the division of the compensation as between landlord and tenant depends upon the terms of the contract between the landlord and tenant, to which contract the Territory is not a party and with which it is not concerned. This will be discussed hereinafter.

The main difficulty presented is whether *mandamus* will lie to compel the trial of the interests of the lessor and the lessees in one proceeding and prevent the withdrawal of the sum of $3,585,999.

This court has frequently held that mandamus is not a

substitute for appeal; that where there is a discretion in the trial judge, in the absence of a clear abuse of such discretion it will not be interfered with by mandamus. The latest decision of this court so holding was *Petition Tactacan, Writ of Mandamus,* 42 Haw. 141.

The object of mandamus is set forth in section 236-2, Revised Laws of Hawaii 1955, as follows:

> "The object of this order is to prevent a denial of justice, and it therefore issues in all cases where the law has assigned no specific relief by the ordinary means, or even where a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such a delay, that the public good and the administration of justice will suffer from it, and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature whatever."

In the case of *Virginia* v *Rives*, 100 U. S. 313, 323, the statement is made:

> "In what case such a writ [of mandamus] is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion, except when that discretion has been abused."

The quotation thereafter states:

> "One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds."

La Buy v. *Howes Leather Co.*, 352 U. S. 249, decided January 14, 1957, sustained the Court of Appeals in issuing writs of mandamus requiring the Federal District

Judge to vacate his orders referring two civil antitrust actions to a master for a hearing. Paragraph 1 of the syllabus states:

> "Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it had discretionary power under the All Writs Act, 28 U. S. C. § 1651(a), in proper circumstances to issue writs of mandamus reaching them."

In its discussion of the Court of Appeals issuing the writ, the court pointed out that the cases had been burdensome to the petitioner and showed the long records that had already taken place in the District Court proceeding, the many amendments and preliminary pleas, etc., as in the case before us.

See *Fong, Auditor* v. *Sapienza, Judge*, 39 Haw. 79, where a writ of mandamus was issued because of an abuse of discretion by the trial judge with reference to a continuance.

Under the liberal provisions of the territorial statute mandamus will lie in this case if, as stated in *Carlock* v. *United States*, 53 F. (2d) 926:

> "It is a fundamental principle, governing condemnation proceedings, where several interests are involved, such as estates for life, or in remainder, or leaseholds, or in reversion, in the property to be condemned, all should be combined in determining the value of the fee, after which the total value of the fee can be subdivided in satisfaction of the values fixed upon the various interests involved."

A condemnation proceeding is in the nature of an action in rem. (*Burkhart* v. *United States*, 227 F. [2d] 659 [CCA 9, 1955]; *United States* v. *Honolulu Plantation Co.*, 182 F. [2d] 172 [CCA 9, 1950]; *Eagle Lake Improvement Co.* v. *United States*, 160 F. [2d] 182; *Meadows* v. *United States*,

144 F. [2d] 751 [1944]; *Carlock* v. *United States*, 53 F. [2d] 926.)

> *"It is not the taking of rights of designated persons, but the taking of the property itself.* Duckett & Co. v. United States, 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. ed. 216. * * * The sum determined to be due for the taking is apportioned between the claimants, *but, 'as between the condemnor and the condemnee, the property is valued as a whole.'"* (*Eagle Lake Improvement Co.* v. *United States*, 160 F. [2d] 182.) (Emphasis added.)

See also *Meadows* v. *United States*, 144 F. (2d) 751, 752. There are many other authorities to a like effect.

It is elementary that "land" or "real estate," as used in statutes relative to eminent domain, include the improvements attached to the realty. The authorities are unanimous to that effect.

> "Not only is soil affected, but everything annexed to the soil is included. It matters not that such conditions are by act of nature or by artificial affixation." (Nichols, *Eminent Domain*, 3d ed., vol. 2, § 5, p. 10.)
>
> "Fixtures upon the property taken must be valued and paid for as part of the real estate * * *." (Lewis, *Eminent Domain*, 3d ed., vol. 2, p. 1276.)

Our statute relative to condemnation proceedings provides as follows:

> *"Damages assessed, how.* In fixing the compensation or damages to be paid for the condemnation of any property, *the value of the property sought to be condemned with all improvements thereon shall be assessed,* and if any of the improvements are separately owned, the value thereof shall be separately assessed. * * *" (R. L. H. 1955, § 8-21.) (Emphasis added.)
>
> *"Assessed as at day of summons.* For the purpose of assessing compensation and damages, the right thereto shall be deemed to *have accrued at the date of sum-*

mons, and its actual value at that date shall be the measure of valuation of all property to be condemned * * *.

"No improvement put on the property subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages." (R. L. H. 1955, § 8-22.) (Emphasis added.)

It will be noted that the rights of the occupants *"accrued"* on September 13, 1957 when the tenants still held tenancies under the provisions of their various leases; prior to that time there could be no claim that the Territory had any right to the property either of the lessor or of the lessees.

The dictionary gives the following definition for the word "accrue":

"To come into existence as an enforceable claim; to vest as a right; as, a cause of action has *accrued* when the right to sue has become vested. * * *"

See also the numerous cases cited in *Words and Phrases* (pages 582-602, particularly pages 592 to 597) where the word "accrue" or "accrued" means to become absolute or vested.

As pointed out in the majority opinion, before the amendment to the complaint it included within the taking the land and all improvements thereon. The amendment attempted to strike from the complaint the interests, if any, of the petitioners in the land and the right of the petitioners to remove their improvements.

In justifying this the majority opinion attempts to distinguish *United States* v. *Sunset Cemetery Co.*, 132 F. (2d) 163, where the court *refused* to permit an amendment to the declaration of taking so as to exclude anything already seized; it held that by the original declaration of taking the rights of both parties were fixed and could not thereafter be altered. The claim is made that under our

statute title to the property or interest taken vests in the condemning authority not by the filing of the complaint, nor by the entry of an order of possession, but only upon the entry of the final order of condemnation. But see the decision in *Honolulu* v. *Lord, et al.*, 36 Haw. 348, wherein it was said:

> "Section 64, Revised Laws of Hawaii, 1935 [now R. L. H. 1955, § 8-22], provides that for the purpose of assessing compensation and damages *the right thereto shall be deemed to have accrued at the date of the summons*, which is equivalent to saying *the property shall be deemed to have been taken at that time.*" (Emphasis added.)

As further pointed out in this decision, equitable principles are applied in the payment of just compensation for the taking of property.

Numerous cases, including cases in the Supreme Court of the United States, hold that the "blight of condemnation" exists from the date of the institution of proceedings as the owner cannot thereafter fully utilize his property and just compensation requires that he be made whole.

If we are to apply equitable principles to "just compensation" (Fifth Amendment to the Constitution of the United States) we must take the substance rather than the form. The majority opinion states that the only recourse the petitioners would have would be for abandonment and not for compensation for the taking of their interests. This would be true if there were a bona fide abandonment. Obviously there was none. By first abandoning its original taking including all the lands and its subsequent retaking, the Territory attempts to deprive the tenants of an accrued right by a flimsy technicality. One cannot do indirectly what would be illegal if done directly. (*Dress Mfg. Co.* v. *Cadinha*, 36 Haw. 732, 742.)

If we start with the indisputable proposition that im-

provements placed upon land become a part thereof, and the Territory instituted a proceeding to condemn "the lands of the Damon Tract adjacent to the airport," it became obligated to pay the full value thereof as of the date of summons; this would include the improvements thereon.

For example, if we assume that lot X owned by A has a value of $1,000 and improvements thereon of the value of $1,500, the Territory would be obligated to pay $2,500 as the value of the land even though it might not desire or use the improvements upon the land.

If we have the same lot X owned by A and B or more owners and the government condemns it, it would have to pay the same amount, to be divided among the various owners in accordance with their respective interests.

If we assume that the fee of lot X was owned by A, and that A had leased it to B with the provision that in case of condemnation B should have the value of the improvements he might erect thereon, the government would still be obligated to pay $2,500 compensation for the *property* and A and B would divide according to their contract.

It is no concern of the government how the owner of the fee and the owner of the leasehold divide the proceeds. This is only justice and common sense. There are numerous authorities to this effect, a few of which are as follows:

In *United States* v. *Seagren*, 50 F. (2d) 333, it is stated:

> "The question thus becomes whether or not this private stipulation for removal between the landlord and the tenant inures to the benefit of the government when condemning the estate of both? *Can the United States, exercising its right of eminent domain, change the essential character of structures from realty, which it must pay for, to personalty, which it may order removed without payment, because a landlord and tenant, dealing upon private considerations of reciprocal interest and expenditure, have years before agreed as*

between themselves that upon their termination of their lease the tenant might remove his structures?

"* * *

"If the structures here in question had been built by the landlord, they would have been taken and paid for by the government without question, as the government concedes they are now part of the realty. Is the tenant's reserved power of removal as against the landlord's termination of the lease to work a forfeiture in favor of the government? We think not.

"The inherent character of these structures is real estate; no agreement can change that character, though the landlord may waive the right which might otherwise accrue to him from the character of the structures placed upon his land. At the most, that is all that this agreement did.

"We find the controlling rule well stated in Nichols on Eminent Domain: 'It frequently happens that, in the case of a lease for a long term of years, the tenant erects buildings upon the leased land or puts fixtures into the building for his own use. It is well settled that, even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property, and, in the absence of special agreement to the contrary, may be removed by the tenant at any time during the continuation of the lease provided such removal may be made without injury to the freehold. *This rule is however entirely for the protection of the tenant and cannot be invoked by the condemning party. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant.*' Nichols on Eminent Domain (2d Ed.) vol. 1, § 234."

State v. *Miller*, 92 S. W. (2d) 1073, 1074, where the State sought to condemn certain land for highway purposes and took the position that a building on the desired strip should be removed by the owner to another portion of his land and the State should be required to pay for no more than the bare land taken plus the cost of removing the improvements, the court said "Such a rule would be intolerable. * * * The building here under consideration was a permanent improvement and constituted an appurtenance to the land which would pass with the title in an ordinary conveyance, and in our opinion the state should be required, as held by the trial court, to accept and pay for it along with the land so condemned."

In *Brazos River Conservation and Reclamation District* v. *Adkisson*, 173 S.W. (2d) 294, the court held that where fixtures were of such a character that if put in by the owner they would constitute a part of the real estate, they must be paid for as real estate by the condemner, and that it is immaterial that as between the lessor and the lessee the lessee had the privilege of removing such fixtures at the termination of the lease.

In *Jackson* v. *State of New York*, 213 N. Y. 34, 35-36, Justice Cardozo, one of the great judges of modern times, went even further and held in eminent domain the value of fixtures in a building taken by the State must be considered in estimating total value of property appropriated. The board of claims had refused to award any compensation to the claimant for the machinery, shafting, elevators and conveyors contained in the building. This equipment was annexed to the building in such form *as between the vendor and vendee* they would have constituted fixtures. Justice Cardozo stated:

> "We think that the power of the State is not so great, nor the plight of the citizen so helpless. Condemnation is an enforced sale, and the State stands toward the

owner as buyer toward seller. On that basis the rights and duties of each must be determined. It is intolerable that the State, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of second-hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value."

Again, in a New York case, *In re Block Bounded by Avenue A, etc.*, 66 Misc. Rep. 488, 122 N. Y. S. 321, 339, the court said:

"The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they must all be regarded as real property; that is, as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building, and the tenant was under no more obligation to remove them than he would be to remove a building if he were the owner. As between the tenant and the owner, however, the trade fixtures were personalty, and could be removed, and therefore any award made for them would go to the tenant."

The majority opinion attempts to distinguish the cases cited heretofore on the ground that the government in those cases was taking the whole fee and not something less than fee simple. Certainly the government may under proper circumstances if its needs require condemn less than a fee simple interest, but in this case the attorney general was authorized and directed to take the adjacent "lands" and there was no intent or authorization to take

less than the fee simple. It is true the attorney general did attempt to take two bites instead of one in the proceeding to obtain title to all of the interests without paying the full value therefor, that is, the value of the improvements upon the land. But all the cases hold that the contract between landlord and tenant does not inure to the benefit of the government and it may not avail itself of any agreement between landlord and tenant so as to deprive the tenant of "just compensation."

We think this court may take judicial notice that a large part of the land in the Territory is held by a very few large estates which will only lease and not sell their properties. For example, on the Island of Oahu more than one-third of its area is owned by three estates, properties of which include urban as well as rural lands; that many residences, business establishments, banks and elaborate hotels are built upon such leased property; that both the territorial and federal governments have taken under eminent domain, and are continuing to take, large and valuable areas throughout the Territory where the improvements are of much greater value than the bare land.

Years ago most of the leases made by these large estates contained a provision that in case of condemnation the lessee should not be entitled to any claim for compensation but that "all compensation payable or to be paid for or on account of the said premises by reason of the condemnation as aforesaid, shall be payable to and be the sole property of the lessors, and the lessee shall have no interest in or claim to such compensation or any part or parts thereof whatsoever." (*Bishop* v. *Pittman*, 33 Haw. 647, 650.)

When the site for Hickam Field was taken by the government of the United States for an airfield, the Bishop Estate received many thousands of dollars for improvements which had been put upon its land by various tenants,

the government having to pay full value of the lands and improvements. The writer of this opinion represented the United States in this proceeding which took over Watertown and other adjoining areas with all the improvements thereon represented mostly by numerous small residences and business establishments, many such representing the life savings of industrious but humble citizens. It was heartbreaking to see these tenants deprived of their property with no compensation. Under the contract the Bishop Estate received the full compensation or total value of the property for which the United States had to pay. This court held that the Bishop Estate could not donate to the tenants the value of improvements erected by them, even though it was reaping where it had not sown. (*Bishop* v. *Pittman, supra.*)

To cure this harsh provision in the leases, many landlords thereafter revised such covenants (some upon demands of tenants) so as to provide that in case of condemnation the lessee should receive the value of the improvements placed upon the land by him. Now the Territory by a subterfuge attempts to deprive the tenants of all value of his covenants by saying you can remove your improvements under another covenant (which was for an additional protection of the tenant) and therefore it is unnecessary to pay you the value thereof. The government was not a party to the contract nor was the contract for the benefit of the government, but for the tenants, and certainly because of this contract the government should not be permitted to take property at less than its fair value. If this is permissible the tenant is truly between Scylla and Charybdis or, in popular parlance, between the devil and the deep blue sea when he has erected improvements upon leasehold property.

In *United States* v. *General Motors*, 323 U. S. 373, 381, where the United States Government took over for a tem-

porary period the unexpired term of a lease and wished to pay only the rental value of an empty building for such taking from the tenant, the court refused to permit such proceeding, saying:

> "If the Government need only pay the long-term rental of an empty building for a temporary taking from the long-term tenant a way will have been found to defeat the Fifth Amendment's mandate for just compensation in all condemnations except those on which the contemplated public use requires the taking of the fee simple title. * * * If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' * * *."

Again, on page 382, the court points out that when the government does not take the entire interest but by the form of its proceeding chops it into bits of which it takes only what it wants, refusing to pay more than the market rental value for the chips so cut off, it states that this is neither the taking nor just compensation the Fifth Amendment contemplates. On page 383 the court stated:

> "For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking. This is true whether the fixtures and equipment would be considered such as between vendor and vendee, or as a tenant's trade fixtures."

Conceding that the government may, upon payment of

just compensation, take less than the fee simple, in the present case it did not do so; in fact, very obviously it had no intention to take less than the fee simple. Under the resolution of the Hawaii Aeronautics Commission the attorney general was authorized to and did bring a suit to condemn "the lands of the Damon Tract adjacent to the airport, delineated on the map." It may not use a "device" to escape payment of just compensation, namely, the value of the land taken which included all improvements thereon.

The right to compensation of the land which the Territory took — and that included all improvements thereon — "accrued" on September 13, 1957, in the defendants to the condemnation proceedings. As to how this "just compensation" for what the government was taking, namely, lands which included improvements, was to be apportioned between tenant and landlord was not a matter of concern to the Territory; it was a question between the landlord and the tenants.

As pointed out in case after case, the obligation of the government to pay "just compensation" is not affected by how the "just compensation" may be divided between landlord and tenant. (See cases *supra*.) Any other construction would result in depriving tenants of the property without due process of law and would be a complete disregard of the equitable principles governing compensation in eminent domain. It is well settled that you cannot violate equitable principles by doing indirectly that which you cannot do directly. (*Dress Mfg. Co.* v. *Cadinha, supra*.) Certainly, this "device" is much more flagrant than the one in the cases heretofore cited such as in *United States* v. *General Motors, supra*.

Apparently the movants for a separate trial do not trust a jury finding as between landlord and tenant — and the Territory has joined with them by depositing with the court one dollar as the value of the lessees' interests. The

only ground set forth in the motion for a separate trial is that there are certain leases existing between the movant and the tenants. Clearly, the only trial that can be fair both to the Territory and to the various defendants is to proceed to the condemnation as a single proceeding with the jury under proper instructions valuing both the interest of the landlord and the several tenants.

The authorities cited in the court below by movants for a separate trial do not stand for their contention. Practically all these cases have been discussed heretofore. For example, the motion for separate trials cites *Burkhart* v. *United States, supra,* which was before the Ninth Circuit Court of Appeals on two occasions. This case was remanded after the second appeal with the following statement:

> "The cause is reversed as to the lessees and remanded with directions to proceed to trial between the government and the parcel and that any question as to allocation of the just compensation between the claimants be dealt with after the award for the whole has been settled."

There was a similar holding in *Eagle Lake Improvement Co.* v. *United States* previously cited. It stated as between the condemner and the condemnee the property is valued as a whole.

Incidentally, it may be noted that the Territory in assessing taxes included the improvements of the tenants as realty. (Personal property is not taxed in the Territory.) Yet it now claims that such improvements are personalty.

The contract provisions between the landlord and the tenants are intended to serve as a shield to the tenants and cannot be used by the Territory as a sword to destroy them.

I believe this court has ample authority under our territorial statute, section 236-2 heretofore quoted, to issue the writ of mandamus requested and it should direct the lower

court to proceed with the trial of the case as to all parties and all interests, with the jury under proper instructions fixing the fair value of the interest of each of the parties as of September 13, 1957.

IN THE MATTER OF THE APPLICATION OF BESSIE S. AKANA, A DEFENDANT IN CIVIL NO. 3234, TERRITORY OF HAWAII *v.* SAMUEL RENNY DAMON, HERMAN VALDEMAR VON HOLT, DAVID HEBDEN PORTEUS, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED, ET AL., ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, FOR A WRIT OF MANDAMUS DIRECTED TO ALBERT M. FELIX, THIRD JUDGE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

No. 4066.

MOTION FOR AN ORDER STAYING TRIAL OF CONDEMNATION CASE

and

MOTION TO DISMISS APPEAL.

ARGUED MAY 9, 1958. DECIDED JUNE 6, 1958.

RICE, C. J., STAINBACK AND MARUMOTO, JJ.

OPINION OF THE COURT BY MARUMOTO, J.

Petitioner has appealed to the United States Court of Appeals for the Ninth Circuit from the judgment of this court denying her petition for a writ of mandamus. After she filed her notice of appeal, petitioner filed in this court a motion for an order staying the trial of Civil No. 3234 in the court below until her right to participate therein should be determined on appeal. Lillian Tom Loo, Beatrice L. Luke and Kan Jung Luke, thereafter, filed in this court a motion to dismiss petitioner's appeal.

Upon the filing of the notice of appeal to the court of appeals, the Federal rules of civil procedure apply to the instant case, and the authority of this court over the case is that of a United States district court under such rules, not the authority of the supreme court under the Hawaii rules.

Petitioner's motion is not for a stay of any further proceeding in the instant case in this court. It is a motion for an injunction directed to the court below pending appeal. Thus, rule 62 (c) of the Federal rules applies to the motion.

Rule 62 (c) recognizes the power of the district court to preserve the status quo pending appeal and is an exception to the rule that perfection of appeal deprives the district court of jurisdiction to act further in the appealed case. The exercise of the authority under the rule rests within the sound discretion of the district court.

The trial in the court below is set for July 16, 1958. It is for the purpose of determining the compensation payable for the property presently sought to be condemned. The property presently sought to be condemned is the interest of Lillian Tom Loo, Beatrice L. Luke and Kan Jung Luke, being a reversionary interest, or a fee simple interest subject to existing tenancies.

Petitioner contends that she and the other defendants in Civil No. 3234 on whose behalf she prosecuted the petition for a writ of mandamus have "a right to have the value of their improvements which are a part of the land being condemned determined in the same trial and by the same jury as determines the value of the interest of said defendants Loo and Luke in the land condemned," and such right will be rendered nugatory if the court below is not enjoined from proceeding with the trial of the condemnation case.

In our opinion in the instant case reported on page

415, *ante*, we did not discuss this contention because we deemed such discussion unnecessary in view of our holding that the interests of the petitioner and other tenants similarly situated were not sought to be taken in the condemnation case.

Petitioner's contention is based on the unit rule of valuation in condemnation, which forbids the separate valuation of the land and the improvements thereon. In *United States* v. *City of New York*, 165 F. (2d) 526, the court, per Judge Learned Hand, said of the unit rule as follows:

> "Although the 'Unit Rule' would seem to be in the shadowland between substance and procedure, and as to the last we look to the state law, we shall not try to assign any place to it, because we are not aware of any ascertainable difference upon the point between the state and the federal decisions. Indeed, we think that it is an undue simplification to extract from the books any 'Unit Rule' whatever, in the sense of general authoritative directions. What has happened, so far as we can see, is that, as different situations have arisen, the courts have dealt with them as the specific facts demanded. One of these situations has been when a parcel or plot of land has been improved, and when — as is substantially always the case — it is impossible to separate the improvements so as to transfer them independently. In such situations the only exchangeable property is the union of 'site' and improvements; and this, being indissoluble for purposes of transfer, must be valued as one. The argument runs that, because of this it is erroneous as a matter of law ever to add together a supposititious 'site' value and a supposititious improvement value. The argument, so put, is undoubtedly a highly important caution, when the attempt is made to appraise improved land by a process

of cumulation; but we question whether it has any further office than to keep before the tribunal the only relevant objective: the exchange value of the newly emerged unit. It is true, when an area has been subdivided into plots that the very fact that these have been made separately saleable, will ordinarily make it desirable to appraise the whole by separate valuations of each plot; but even that is not, so far as we can see, an inexorable condition. Be that as it may, it certainly does not follow, because 'site' and improvements have been inextricably welded, that it is never possible to come at their joint value by attributing one factor to 'site' and another to improvements. Value, especially when we are dealing with non-fungibles, is in application as impalpable a concept as can be, and we should be unwilling to circumscribe the approach to it to the opinions of experts. All that we can gather from the books is that the tribunal must be strictly on guard that it has to do with an indivisible object of transfer."

In that case, the court approved a separate valuation of the interests of the tenants "in the houses they had built on the plots, which they had reserved in their leases."

In this jurisdiction, whatever may have been the practice before the amendment of R.L.H. 1945, § 314, by Act 200 of the Session Laws of Hawaii 1947, after the effective date of the amendment, the unit rule applies where the land and improvements are owned by the same owners, but it does not apply where the owners of the land are different from the owners of the improvements. The pertinent provision of R.L.H. 1945, § 314, as amended, now incorporated in R.L.H. 1955, § 8-21, reads as follows: "In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned *with* all improvements thereon shall be assessed, and *if any of the improvements are sepa-*

rately owned, the value thereof shall be separately assessed." (Emphasis supplied) Before the amendment, the provision in R.L.H. 1945, § 314, read as follows: "In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned and all improvements thereon, shall be separately assessed."

In view of R.L.H. 1955, § 8-21, we conclude that the petitioner and other tenants similarly situated are not entitled, as a matter of right, to have the value of their improvements determined in the same trial and by the same jury that determines the value of the reversionary interest of Lillian Tom Loo, Beatrice L. Luke and Kan Jung Luke. Furthermore, the condemner and the owners of the reversionary interest stand to be substantially prejudiced by the delay in trial, the condemner by the possibility that it might be burdened with the payment of interest during the period of delay on the amount of additional compensation that might be awarded to the owners of the reversion and the latter by loss of use of such additional compensation. It may be noted that the petitioner requests that the trial be stayed without the requirement of any bond in addition to the bond for costs on appeal.

We, therefore, deny petitioner's motion. The denial of the motion will not deprive the petitioner and other tenants similarly situated of their day in court for the determination of the value of their improvements, if the improvements should be taken.

We, also, deny the motion of Lillian Tom Loo, Beatrice L. Luke and Kan Jung Luke to dismiss petitioner's appeal. Dismissal of appeal is not one of the powers reserved to this court after the perfection of appeal.

Harriet Bouslog (Bouslog & Symonds) for petitioner, for motion to stay and contra to motion to dismiss.

John P. Russell, Special Deputy Attorney General, and

SUPREME COURT OF HAWAII.

DISSENTING OPINION OF STAINBACK, J.

Harold W. Nickelsen, Assistant Attorney General, for the Territory.

J. Garner Anthony (*Robertson, Castle & Anthony*) and *Chuck Mau* (*Mau, Hong & Kanemoto*) for Lillian Tom Loo, Beatrice L. Luke and Kan Jung Luke, for motion to dismiss and contra to motion to stay.

DISSENTING OPINION OF STAINBACK, J.

I respectfully dissent from the opinion of the majority herein refusing to grant petitioners' motion for a stay. We need not resort to the Federal rules of civil procedure but this court, under the statute giving it general superintendence of courts of inferior jurisdiction, has the right to delay a trial until the Circuit Court of Appeals has passed upon the various questions involved in this appeal. In *Whittemore et als.* v. *Farrington, et als.*, No. 3032 in this court, such a stay was made by the present Chief Justice on the 6th day of June, 1955.

As pointed out in the dissent from the original opinion in this case, "When there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights." (2 Lewis on *Eminent Domain* [3d Ed.], § 716, p. 1253.) In Lewis, the further statement is made "In estimating the compensation to the owner of any particular interest or estate less than the whole, the same general rules apply as in estimating the compensation when the entire interest is in one person." To this rule there may be a few exceptions, depending to a large extent upon particular circumstances.

In *State ex rel. McCaskill* v. *Hall*, 28 S. W. (2d) 80, 81 (1930), the statement in Lewis on *Eminent Domain* is quoted. The court stated:

> "The uniform practice, however, has been, as we understand it, to consider the property about to be

condemned as an entire estate, so far as concerns the public, the fee owner, and those having lesser interests therein. All persons are made defendants whose interests are to be foreclosed; but this is done, not for the purpose of determining questions of title between them, but so that they may be heard upon the issues of the right to condemn and the amount of damages to be awarded in gross. While therefore apportionment and separate awards are often convenient and beneficial where several persons own interests in a single tract or parcel of land, and while, furthermore, such are quite commonly made where the proceedings are in a court or tribunal having power and capacity to inquire into the variant interests, even in the latter case the well-nigh universal mode of reaching a fair valuation of the property and determination of the damages is to consider the property as though the entire and undivided estate and all interests in the property were in a single person, and to find the value and damage in gross, thereafter apportioning the amount of the award thus arrived at between the various parties according to their interests."

This case is followed in *City of St. Louis* v. *Rossi*, 333 Mo. 1092, 64 S. W. (2d) 601, 605 (1933).

United States v. *25.936 Acres of Land, etc.*, 153 F. (2d) 277 (1946), holds:

"Where land in which various persons have separate interests or estates is taken by federal government for public use, the amount of compensation to be paid must be determined as if the property was in a single ownership and without reference to conflicting claims or liens."

An early case, *Kohl et al.* v. *United States*, 91 U. S. 367 (1875), where there was a joint proceeding against all owners of land proposed to be taken, held the statute

"treats all the owners of a parcel of ground as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels * * *." The statute of Ohio secured to the owners "of each separate parcel" a separate trial, but the court is not required to allow a separate trial to each owner over an estate or interest in each parcel.

Other cases similarly holding are *Grand River Dam Authority* v. *Gray*, 192 Okla. 547, 138 P. (2d) 100 (1943); *Meadows et al.* v. *United States*, 144 F. (2d) 751 (1944); *Carlock* v. *United States*, 60 App. D. C. 314, 53 F. (2d) 926 (1931); *Bellaire* v. *Baltimore & Ohio R. R.*, 146 U. S. 117 (1892); *New Jersey Highway Authority* v. *J. & F. Holding Co.*, 40 N. J. S. 309, 123 A. (2d) 25 (1956).

In *Bogart* v. *United States*, 169 F. (2d) 213, it is said:

> "A condemnation proceeding is an in rem proceeding and when land is taken in which separate interests or estates are owned by two or more persons, as between the public and the owners, it is regarded as one estate. One award as just compensation for the entire value of the land is made and it stands in place of the property appropriated as the equivalent thereof. The distribution of the award between the owners of separate interests or estates is a matter wholly between them and the public is not concerned therewith."

The majority opinion herein cites *United States* v. *City of New York*, 165 F. (2d) 526, in a discussion of the so-called "unit rule" in condemnation proceedings. We have no quarrel with the various holdings in that case. It involved condemnation by the United States Government against the City of New York and various other claimants of a tract of land next to the Brooklyn Navy Yard known as "Wallabout Market." The tract involved some 53 acres on both sides of Washington Street, Brooklyn, parts being on the waterfront and much the greater part under water.

The dry part had been "improved," that is, streets and sidewalks had been opened and paved, bulkheads had been built on the waterfront, sewers and water mains had been laid. It was occupied for business purposes, being for the most part covered with buildings owned by the City and some by private persons. On the land under water piers had been built out from bulkheads; one of these was used as a "freight terminal." The government deposited $4,000,000 in payment for the whole area, which was later increased by $261,230, and asked for the liquidation of all claims. Three commissioners were appointed who sat for more than two years taking evidence. The commissioners made an award in twelve separate items and the objection of the United States was that in so doing they violated what it called the "unit rule." The award to the private house owners was composed of three items: (1) the interest in the houses they had built on the plots, which they had reserved in their leases; (2) for the value of their terms for years, as interests in the land itself; (3) for their interests in the irremovable fixtures. The court held that in fixing the awards the commissioners could properly assess buildings, sheds, piers, and refrigeration lines on the land separately from the value of the lands and, further, so far as the commissioners meant to set a value to the structures which they added to the site value would stand as such, but the same was not true of the second item, namely, *the leasehold interest*, stating: "The value of the lessees' terms for years was part of the value of the fee itself, and any separate allowance for them was obvious duplication, so far as concerns the United States." It then continued "The item for 'leaseholds' must moreover be reassessed before it is allowed against the City; the assessment of the 'site' values may change it." And it concludes that "the item, 'Leaseholds' will have to be reassessed for the reason already given; and it will be deducted

from the City's award." Obviously, there is nothing erroneous in the conclusion of the court that the value of the fee so far as the remaindermen is concerned is the fee simple value less the value of the leasehold.

This case held that just compensation for land taken by the Federal Government is a "Federal question" as to which state decisions are not authoritative; it also held where areas have been subdivided into plots and plots have been made separately salable would ordinarily make it desirable to appraise the whole in condemnation proceedings by separate valuations of each lot. It further stated that where a parcel of land has been improved and when, as is substantially always the case, it is impossible to separate the improvements so as to transfer them independently, then the only exchangeable property is the union of site and improvements and this being indissoluble must be valued as one, although it cautions against attempting to add together a suppositious site value and the suppositious improvement value.

Following the line of reasoning in the case of *United States* v. *City of New York, supra,* the value of the land as of September 13, 1957, must be found, this value to include all improvements thereon; then the value, if any, of the leaseholds including the improvements, which by stipulation go to the lessees, must be deducted, so as to leave that to which the owners of the fee are entitled. This cannot be done if the owners of the fee are permitted to try the value of their fee separate and apart from the leasehold and improvements on the property. The improvements upon the property as of September 13, 1957, are clearly a part of the "lands" which the Hawaii Aeronautics Commission directed the attorney general to condemn for airport purposes. The attorney general had no authority to proceed otherwise.

In view of the fact that the court below allowed a dis-

continuance as against the lessees, it is difficult to see how this will not deprive the petitioners of "their day in court for the determination of the value of their improvements, if the improvements should be taken." (Majority Opinion.) Obviously with the order of September 20, 1957, putting the Territory in possession of the lands and the allowance of the discontinuance against these petitioners, the court decided these lessees had no rights therein except to remove their buildings. If the lessees hereafter attempt in any way to proceed against the Territory, the court below would reiterate its conclusion unless a higher court directs it upon the method of valuation of the interests of the lessees and the fee holders. Such decision would require another appeal to this court by these lessees and probably to the Circuit Court of Appeals at an expense they could ill afford.

It is difficult to follow the argument of the majority opinion that Act 200, Session Laws of Hawaii 1947, changed the method of valuing lands and improvements in cases of condemnation. In fact, the whole amendment, as will be shown hereinafter, is to substitute the attorney general for the superintendent of public works in condemnation proceedings.

Section 314, Revised Laws of Hawaii 1945, regarding the assessment of damages provided that the property should be valued and all improvements thereon should be separately assessed, and if the property sought to be condemned constitutes only a part of a larger tract the damages which will accrue to the portion not condemned by reason of its severance must be assessed (separately) and the benefits, if any, by reason of construction of improvements by the government must be assessed and deducted from the damages.

The amendment (Act 200, Session Laws of Hawaii 1947) provides "The attorney general of the Territory

may, at the request of the head of any department of the Territory, or as otherwise provided by law, institute proceedings on behalf of the Territory for the condemnation of property as provided for in this chapter." This substitutes the attorney general for the superintendent of public works in condemnation proceedings. The amendment does make somewhat clearer that the improvements upon property must be separately valued by inserting therein the additional provision that if any of the improvements are separately owned, the value thereof shall be separately assessed. However, the separate assessment of improvements and site does not necessarily require or permit separate trials. The statute provides for such separate assessments of the site and improvements in the same trial.

The reports of the judiciary committees of both the House and the Senate on Act 200 show the purpose of the bill, in addition to several minor amendments, is to substitute the attorney general for the superintendent of public works. The House judiciary committee report is as follows:

> "This bill amends the eminent domain laws, and provides that territorial condemnations shall be instituted on behalf of the Territory by the attorney general, as requested by department heads, instead of all such suits being brought by the superintendent of public works as at present. The present provision is not appropriate in some cases, for example, where the commissioner of public lands is charged with the duty of acquiring the land involved. The method of obtaining possession of property in eminent domain proceedings is simplified by this bill and it further is provided that upon the condemnation of private fishing rights an order of possession may be obtained. The bill makes other minor amendments. These portions of the bill are favored by your committee."

The report of the Senate judiciary committee is similar.

Certainly if there was any intent on the part of the legislature to change in any manner the so-called "unit rule" of valuation or give separate trials to the owners of the fee, the committee reports would have contained some reference thereto.

The stay would not work any injustice upon the owners of the fee inasmuch as if they obtained a greater amount than that which was deposited with the court they would be entitled to interest at six per cent upon all unpaid amounts from the date of the issuance of summons. Certainly no one could ask for a better investment than a six per cent return on such a government obligation. Further, the attorney general did not oppose the stay and does not insist upon a supersedeas bond unless the stay runs longer than September as, according to his statement, no damage would result until the Territory becomes in a position to pay such awards.

In my opinion a stay should be granted so that "The uniform practice * * * to consider the property about to be condemned as an entire estate, so far as concerns the public, the fee owner, and those having lesser interests therein" be followed.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BESSIE S. AKANA, etc.,
Appellant,

vs.

ALBERT M. FELIX, Third Judge, of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, TERRITORY OF HAWAII, LILLIAN LOO, BEATRICE L. LUKE and KAN JUNG LUKE,
Appellees.

No. 16,066
July 14, 1958

Upon Motion for Order Staying Trial

Before: FEE, BARNES and HAMLEY, Circuit Judges

PER CURIAM:

There is pending a condemnation action in a territorial court, wherein the Territory of Hawaii, as condemnor therein, was given possession of all the real property. A motion was made and order granted thereon, whereby separate trials were allowed as to the alleged owners in fee and as to alleged leaseholders of portions of the real property, who were all originally defendants. By subsequent order, the Territory was permitted to abandon proceedings against, and the right to possession of, such interests of the leaseholders, and an amended complaint was filed against the alleged owners in fee alone. Subsequently, Bessie S. Akana, one of the alleged leaseholders in the territorial trial court, for herself and others in that class, filed in the Supreme Court of the Territory of Hawaii a petition for a writ of mandamus directing the trial judge to vacate an order fixing date for trial as to the alleged fee owners and the order of amendment which eliminated the alleged leaseholders from the amended complaint and the order

of possession, and also directing the trial judge to vacate his order directing separate trials of the interests of the alleged fee owners and the alleged leaseholders.

The Supreme Court of the Territory refused to issue the writ of mandamus. Appeal was taken by the petitioner, Bessie S. Akana, to this Court from this order. Thereafter, petitioner and appellant Bessie S. Akana made a motion in the Supreme Court of Hawaii for an order staying trial of the original condemnation case, which petition was denied.

Thereafter, Bessie S. Akana filed a motion in this Court for an order staying the trial of the eminent domain proceedings in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, until her right to participate therein could be determined by this Court on appeal from the judgment of the Supreme Court of the Territory of Hawaii denying a writ of mandamus, as above noted. We will deal with the matters very shortly. The motion to stay is not properly within our cognizance. We have no appeal here in the condemnation case. In fact, the condemnation case has not yet been tried, and there is, of course, no appeal presently even in the Supreme Court of Hawaii. We would have no power under the statute to intervene with the discretion of a trial judge in the Territory as to when and how he should set a particular case for trial.

There is before us also the appeal from the Supreme Court of Hawaii from an order denying the writ of mandamus directed to the trial judge. The Supreme Court denied the writ of mandamus on a perfectly valid ground of territorial law. It was held that, where there is a discretion in the trial judge, the exercise of such discretion may not be interfered with by mandamus. The court further held that it had consistently taken that position with the exception of one case where it was held that discretion had been abused The court further held that, under the law of the Territory of Hawaii, discretion in this instance of the trial judge had not been abused. This holding is perfectly adequate to determine the issue and the refusal of the writ. Appellant urges that the court discussed some questions under the Constitution of the United States and also that its future holdings in the condemnation case were forecast in such a way that we can now consider

them. The discussion of no constitutional points was necessary to the holding of the court that mandamus should be refused. What the court may have said as to the principles governing the future disposition of the condemnation action we have no concern. There was not, in any event, a final decision on these points. We express no opinion upon the matter except that the refusal of mandamus was based upon the opinion of the Supreme Court as to the discretion of the trial judge. When there is a final decision in the condemnation action, unquestionably, petitioner and others in like situation will have an adequate remedy by appeal to the Supreme Court of the Territory. The motion for order staying trial is denied. The motion of appellees to dismiss the appeal in the mandamus case is granted.

(Endorsed:) Per Curiam Opinion. Filed July 14, 1958.
Paul P. O'Brien, Clerk.

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IN THE

Supreme Court of the United States

October Term, 1960

SAMUEL RENNY DAMON, HERMAN VON HOLT, DAVID HEBDEN PORTEUS, and JOHN EDWARD RUSSELL, Trustees under the will of SAMUEL M. DAMON, Deceased; LILLIAN TOM LOO; BEATRICE L. LUKE; KAN JUNG LUKE; FERMIN ABUCE; H. K. AHUNA; B. S. AKANA, et al.,

Petitioners,

vs.

Territory of Hawaii by HERBERT Y. C. CHOY, its Attorney General,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

HARRIET BOUSLOG
Bouslog & Symonds
63 Merchant Street
Honolulu, Hawaii
Attorney for Petitioners

MYER C. SYMONDS
Bouslog & Symonds
63 Merchant Street
Honolulu, Hawaii
Of Counsel

SUBJECT INDEX

	Page
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	14
Appendices (separately bound)	

TABLE OF AUTHORITIES

CASES

Page

Re Akana, Application for Writ of Mandamus, 42 Haw. 415, 547, 261 F (2d) 773 ..... 6, 7, 11, 12, 13

Burkhart v. United States, 227 F (2d) 659, 210 F (2d) 602 .. 14

City of Larue v. St. Louis Public Service Co., 168 S. W. (2d) 966 14

Cumbaa v. Town of Geneva, 235 Ala. 423, 179 So. 227 14

Duckett & Company v. United States, 266 U. S. 14, 69 L ed 216 14

Jackson v. State, 213 N. Y. 34, 196 N. E. 758 ..... 14, 16

Minneapolis-St. Paul Metropolitan Airports Commission v. Hedberg-Freidheim Company, 226 Minn. 282, 32 N. W. (2d) 569 14

Monongahela Navigation Company v. United States, 148 U. S. 312, 37 L ed. 463 14

In re New York, 120 App. Div. 700, 105 N. Y. S 779 14

In re Appointment of Park Commissioners, 1 N. Y. S. 763 14

St. Louis v. Senter Commission Co., 336 Mo. 820, 82 S. W. (2d) 87 14

State v. Miller, 92 S. W. (2d) 1073, 1074 14

United States v. Honolulu Plantation Company, 182 F. (2d) 172, 174 14

United States v. Seagren, 50 F. (2d) 333, 335 ..... 14, 15

United States v. General Motors, 323 U. S. 373, 384, 89 L. ed 311 15

STATUTES

Revised Laws of Hawaii, 1955, as Amended, Chapter 8 Part I ..... 3, Note 3 Appendix I

Section 1257 (3) 28 U. S. C. 2

TEXTS

Lewis on Eminent Domain (3rd ed.) Vol. 2, p. 1276 14

Nichols on Eminent Domain (2nd ed.) Vol. 1, p. 234 14

No.....

IN THE

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October Term, 1960

SAMUEL RENNY DAMON, HERMAN VON HOLT, DAVID HEBDEN PORTEUS, and JOHN EDWARD RUSSELL, Trustees under the will of SAMUEL M. DAMON, Deceased; LILLIAN TOM LOO; BEATRICE L. LUKE; KAN JUNG LUKE; FERMIN ABUCE; H. K. AHUNA; B. S. AKANA, et al.,

Petitioners,

vs.

Territory of Hawaii by HERBERT Y. C. CHOY, its Attorney General,

Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

PETITION FOR CERTIORARI

Review is sought of the judgment of the Supreme Court of the State of Hawaii dated and entered on March 13, 1961, in accordance with its opinion reported in 44 Hawaiian

[1] All the actions referred to were taken by the Territory of Hawaii prior to its admission as a state, and all judicial action was by territorial courts except the decision and judgment of the Supreme Court of the State of Hawaii of which review is sought. The heading of the original case is carried, although petitioners, whose names are listed in Note 1 of Appendix I, are the only remaining parties in the original action, and the State of Hawaii by its Attorney General, Shiro Kashiwa, is now the respondent.

Reports at page 557[2] under the provisions of Section 1257 (3) of Title 28 of the United States Code authorizing review of final judgments of the highest court of a state where rights have been specially set up or claimed under the constitution of the United States.

QUESTIONS PRESENTED

Is the principle of the common law that buildings are as much a part of the soil as are the rocks, sand and natural features entrenched in the concept of property protected by the Fifth Amendment so that the Territory of Hawaii cannot escape its constitutional obligation to compensate lessees for their buildings as an interest in the fee of land either,

a. by an order of the territorial trial court allowing amendments to a condemnation complaint, limiting the taking to the "fee simple absolute" estate of lessors and their reversionary rights, exclusive of lessees' interests and buildings which lessees own and/or have the right to remove, and judgment against lessees based thereon, declaring lessees entitled to no compensation; or

b. by an order of discontinuance entered by the territorial trial court while lessees' appeal from the order and judgment is pending before an appellate court and without notice or opportunity to them to be heard, and after the Territory has paid lessors estimated compensation and has been in possession of the land for more than a year?

2. If so, is property of lessees taken in violation of the due process and just compensation clauses of the Fifth Amendment by a judicial construction by the highest court of a state that such an order, or such a discontinuance, of the territorial trial court constitutes an abandonment of

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[2] Rehearing was denied February 20, 1961, and the mandate to the trial court was withheld pending certiorari by order dated March 9, 1961. The opinion of the court appears in Note 2 of Appendix I and the opinion on rehearing, the judgment and order staying mandate appear in Note 2 of Apprendix I which is separately bound and accompanies this petition.

condemnation proceedings as to lessees' interests in the fee where the effect of such judicial construction is to deprive lessees of a forum in state courts in which to have their right to compensation for the fee interest and the amount thereof determined?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions of the Fifth Amendment to the Constitution here involved are:

> No person shall . . . [nor] be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

The statutory law of the Territory of Hawaii on eminent domain is contained in Chapter 8 Revised Laws of Hawaii, 1955, as amended.[3]

STATEMENT OF THE CASE

In September, 1957, the 127 petitioners were lessees of land in the Damon Tract which the Territory of Hawaii brought suit to condemn for airport expansion. Petitioners, or their predecessors in interest, were lessees under a series of leases dating back to 1937 when the Damon Tract was first leased for houselots. These leases and the one in effect in September, 1957, reserved to petitioners the ownership of homes they had built on the land, the right to receive, upon condemnation, compensation payable for them, and the right to remove them upon the termination of their lease.[4] Litigation a year or more before condemnation was begun involving petitioners' asserted rights to long term leases of

[3] So far as relevant, these provisions are set forth in Appendix I, Note 3.

[4] Record, p. 130. The provisions of the lease relating to the ownership of buildings, duration and condemnation appear in Note 4 of Appendix I.

the land had resulted in a compromise agreement which provided in part that their lessors would not terminate their leases during any period of condemnation.[5] In the year condemnation was begun, the Territory had valued petitioners' homes as real property for a total of $327,077.00.[6]

The Territory in its complaint named petitioners parties defendant as lessees and occupants of the land being condemned. It alleged that it sought "the lands of the Damon Tract," but not petitioners "right and privilege of removal of the buildings and improvements which may be so removed."[7] After the entry of an *ex parte* order of possession of the parcels of land on which petitioners' houses stood, petitioners secured an order staying possession, and asserted in their objections that the buildings which they owned were an interest in the land taken and the Territory's action in seeking to condemn the land without payment to petitioners of compensation for their improvements

> "amounts to an appropriation of . . . property without due process of law in violation of the Fifth Amendment of the Constitution and in violation of . . . rights under said Amendment not to have their property taken except for public purposes and upon payment of just compensation. (R. p. 81)

Before the objections were heard, the Territory amended its complaint to include within the scope of the taking the improvements owned by the petitioners.

Petitioners' lessors moved to withdraw the whole sum deposited as its estimate of value of the land by the Territory upon the securing of possession. Over petitioners'

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[5] Record, p. 224. The provision of the agreement not to terminate is set forth in Note 5 of Appendix I.

[6] Record, pp. 100 and 173. Personal property is not taxed in Hawaii. Under existing tax practices at the time this valuation represented sixty *per cent.* of the fair market value of the improvements belonging to petitioners.

[7] Record, p. 40. Excerpts from the original complaint appear in Note 7 of Appendix I.

objections, the trial court permitted the Territory orally to amend all pleadings to state the value of the land as $3,585,999.00 and the value of all Petitioners' improvements as one dollar, and permitted the withdrawal by petitioners' lessors of all but one dollar of its deposit. Petitioners' objections to the trial court's allowing possession of parcels in which they had an interest without a deposit based on a *bona fide* estimate of value (R. p. 100) were overruled and on October 31, 1957, the stay order was vacated, and the Territory given possession under an order which read:

> 2. That the Plaintiff is hereby put in possession of all parcels of land herein sought to be condemned which are occupied by the defendants who made said Objections and Motion, together with all property rights of whatsoever nature and all improvements thereon, and with the right to collect all the rent from said occupants. (R. p. 111)

The trial court, on motion of petitioners' lessors, and over their objections, and the objections of the Territory, granted petitioners' lessors a separate trial upon lessors' representation in part that

> movants claim no interest in the improvements erected by defendant lessees and therefore have no interest in any compensation awarded therefore and that the trial of movants' claim along with the claims of lessees would result in inconvenience, delay and prejudice. (R. p. 150)

On January 13, 1958, petitioners filed their answer to the amended complaint setting up their ownership of the improvements attached to the realty on the date of the filing and the entry of the order of possession, and their demand to have a jury determine the just compensation required to be paid them for their interest in the land taken by the just compensation clause of the Fifth Amendment.[8] On the

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[8] Record, p. 172. Excerpts from the answer appear in Note 8 of Appendix I.

same day the Territory again moved to amend the designation of taking in its amended complaint to show it wished to take the parcels described "in fee simple absolute including the reversionary interests of the owners thereof, together with all interests of whatever kind and nature," subject, however, to the interests petitioners claimed as lessees and the improvements they owned and/or had the right to remove.[9]

Upon the entry of an order allowing these amendments over petitioners' objections, petitioners initiated a mandamus action against the trial judge for a writ directing him to vacate the order allowing amendments, asserting the action was tantamount to taking their property without the payment of just compensation required by the Fifth Amendment.[10] Upon denial of the writ by the territorial supreme court in a decision upholding the propriety of the trial judge's action on the ground that nothing was being taken from petitioners, petitioners appealed to the United States Court of Appeals for the Ninth Circuit, urging that the territorial supreme court had disposed of all constitutional issues on the merits adversely to petitioners and further appeals to territorial courts would be futile. That court denied relief saying the writ, under territorial law, was discretionary; the decision on constitutional issues, unneces-

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[9] Record, p. 155. The relevant text of the order amending the amended complaint and order of possession appears in Note 9 of Appendix I.

[10] Petitioners also sought vacation of a prior order of the trial court granting their lessors a separate trial on the ground that their ownership of the improvements was an interest in the land itself which they were entitled to have the same jury that fixed the value of the land apportion between them and lessors. As to this point the dissenting justice wrote: "Clearly the only trial that can be fair both to the Territory and to the various defendants is to proceed to the condemnation as a single proceeding with the jury under proper instructions valuing both the interest of the landlord and the several tenants." [Appendix II]

sary; and petitioners' remedy by appeal to the territorial supreme court, adequate.[11]

During the mandamus action, proceedings in the territorial court were held in abeyance. The Territory, however, continued in possession of the parcels of land of which petitioners' homes were an integral part and never thereafter actually relinquished it. After procuring the February 19, 1958, order purporting to let it take the fee subject to petitioners' leaseholds and ownership of improvements, the Territory appropriated rights under the leases by serving on all petitioners a notice which read:

> Notice of Termination of Lease
>
> To:
> Address:
> Premises Identified as Lot No.
>
> You are hereby notified that your tenancy on the above premises is terminated as of April 30, 1958. You will, however, be allowed to remain in possession until June 16, 1958, if Bishop Trust Company receives on or before May 1, 1958, prorata rental for the period from May 1 to June 16, 1958, computed upon the basis of your present rent, and you will be permitted, so long as you are not in default, to remove your improvements from the premises at any time prior to June 16, 1958. Any improvements on the premises thereafter will be considered abandoned.
>
> Very truly yours,
> TERRITORY OF HAWAII
> By .....[12]
> Assistant Attorney General

---

[11] The texts of the territorial supreme court's opinion and that of the United States Court of Appeals in petitioners' companion mandamus action, Re Akana Application for Writ of Mandamus, 42 Haw. 415, 547, 261 F. 2d 773, are set forth in Appendix II which, with Appendix I, is separately bound and accompanies this petition.

[12] Record, p. 214a. To avoid the necessity of litigation to test the validity of this notice, petitioners entered into an agreement with the Territory preserving their right to challenge it without the necessity of litigation prior to the determination of their man-

On May 27, 1958, after the disposition of the mandamus proceeding, the Territory moved in the trial court for judgment on the pleadings and also sought an express determination there was no reason for delay and an express direction for the entry of judgment against petitioners on the ground that the court had ordered a separate trial against petitioners and there was no reason for delay.[13] Petitioners filed objections to the granting of the motion and sought summary judgment on the issue of liability. Their objections were on the grounds, among others, that the Territory could not constitutionally take the realty and evade paying compensation for the improvements by the devise of exclusion because they were a part of the realty; that the Territory was not entitled to a judgment finding petitioners entitled to no compensation, as payment for their improvements was required by the Fifth Amendment; that it appeared from the record that the Territory, while purporting to exclude the interests of petitioners, had in fact taken them and had assumed to exercise rights under petitioners' leases by giving notice of termination and directing petitioners to exercise their privilege under the leases of removing their improvements or forfeiting them to the Territory; and that even if petitioners were determined not to be entitled to compensation for their improvements as they stood on the land and could be required to remove them, they nevertheless would be entitled to compensation for the difference between the value of the improvements as they stood on the land and their value when severed from the land.[14] The trial court granted the Territory's motion for judgment on the pleadings and denied

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damus action or by appeal. Neither this agreement, nor a subsequent notice of termination given November 17, 1958 by territorial officials to such of petitioners as were still in occupation under the terms of the agreement, were part of the record before the State Supreme Court.

[13] Record, p. 198. Relevant excerpts appear in Note 13 of Appendix I.

[14] Record, pp. 203-205. Relevant excerpts appear in Note 14 of Appendix I.

petitioners motion for summary judgment on the issue of liability by an order which read in part:

> This cause having come on to be heard on plaintiff's motion for judgment on the pleadings against the defendants hereinafter named, and it appearing to the Court that said defendants are entitled to no compensation or damages by reason of the taking in this proceeding inasmuch as the pleadings affirmatively show that no interest of said defendants is being condemned.
>
> IT IS ORDERED that judgment be entered against the defendants hereinafter named on the pleadings, finding said defendants entitled to no compensation or damages by reason of this condemnation.
>
> . . . . .
>
> The motion of defendants . . . for summary judgment on the issue of liability is denied. R. pp. 233-236

On June 18, 1958, petitioners perfected an appeal to the territorial supreme court, assigning as error the above stated grounds urged in opposition to the granting of judgment against them.[15]

In the meantime the separate jury trial to determine just compensation to petitioners' lessors began, and, after several days of trial, the court entered an order approving a stipulation of the Territory and petitioners' lessors and discharging the jury.[16]

On October 8, 1958, during the pendency of petitioners' appeal, the territorial attorney general presented to the

[15] Excerpts from petitioners' specifications of error on appeal appear in Note 15 of Appendix I.

[16] This stipulation, dated July 28, 1958, had attached to it an agreement that in forty-five days the Territory would pay petitioners' lessors $1,361,001 in addition to the $3,585,999 they had already withdrawn from the court in return for a deed covering their interest in the land free and clear of encumbrances other than petitioners' leaseholds, and assign to them all rentals collected by the Territory to the date of the deed, after which the Territory would discontinue the proceeding. The stipulation, order and agreement were not part of the record on appeal and were *ex parte* as to petitioners.

trial court a document entitled "Discontinuance" which read:

> Comes now the Territory of Hawaii, plaintiff above named, by Herbert Y. C. Choy, its Attorney General, and discontinues the above entitled proceeding, and consents to the vacation of the Order of Possession heretofore entered.
>
> Dated: Honolulu, Hawaii, this 8th day of October, 1958.
>
> TERRITORY OF HAWAII
> By Herbert Y. C. Choy
> Attorney General

The document was signed by petitioners' lessors indicating their consent to its entry. The trial judge on the same day entered the following order:

> The Territory of Hawaii having presented its discontinuance of the above-entitled proceedings, *said proceedings having been previously discontinued as to all defendants other than those hereinafter named by Order Amending Amended Complaint and Amending Order Putting Plaintiff in Possession filed February 19, 1958, and Judgment on the Pleadings with respect to the defendants other than those hereinafter named having been filed herein on June 12, 1958*, and defendants K. J. Luke, Beatrice Luke and Lillian Loo and the Trustees of the Estate of Samuel M. Damon, Deceased, having consented to the discontinuance of the above-entitled proceedings and the vacation of the Order of Possession and having waived any claim for compensation or damages by reason of such discontinuance, and good cause appearing therefor,
>
> IT IS HEREBY ORDERED THAT said discontinuance is hereby allowed and the Order of Possession, as amended, heretofore entered herein, is hereby vacated.
>
> DATED: Honolulu, Hawaii, October 9, 1958. [*Italics supplied*]

The document shows the approval of petitioners' lessors.

The Territory attached to the reply brief it filed January 23, 1959 in petitioners' appeal, taken June 18, 1958, from

the judgment finding them entitled to no compensation the discontinuance it subsequently secured from the trial court without prior notice or opportunity to petitioners to be heard, urging that court to declare petitioners' appeal mooted thereby. On September 13, 1960, the Supreme Court of the State of Hawaii so held in an opinion by Mr. Justice Marumoto, the same justice who, as justice of the territorial supreme court, had written the opinion of the divided court denying petitioners' writ of mandamus, approving the propriety of the trial court's order permitting exclusion of petitioners' interest in the fee, and holding the order of exclusion constituted an abandonment of the condemnation proceedings. In the mandamus opinion, Mr. Justice Marumoto said of petitioners' assertion that the trial court's order permitted the taking of their property without just compensation in violation of the Fifth Amendment:

> The petitioners lost nothing by the allowance of the last amendment to the complaint. Their property is not taken. The Territory amended the complaint because it decided not to take the petitioners' property . . They complain that the allowance of the amendment takes away from them the right to just compensation for the buildings which they could have claimed if the Territory proceeded to take the entire interest in the land in accordance with the complaint as first amended on October 26, 1957. Neither the requirement of just compensation under the Fifth Amendment nor the provisions of our statutes governing eminent domain proceedings prevent the Territory from withdrawing, before the right became vested in the petitioners, any advantage which it unwittingly gave them.'
>
> The presiding judge properly allowed the amendment. After the allowance of the amendment the petitioners are not concerned with the trial of the issues relating to the compensation for the taking of the fee simple title, subject to their interests, and they are not deprived of their rights by a separate trial granted to Lillian Tom Loo, Kan Jung Luke and Beatrice L. Luke.

> The petition for a writ of mandamus is denied. [Appendix II]

The late Mr. Justice Stainback, dissenting justice of the same court,[17] denied there was any genuine abandonment, saying:

> If we are to apply equitable principles to "just compensation" (Fifth Amendment to the Constitution of the United States) we must take the substance rather than the form. The majority opinion states that the only recourse the petitioners would have would be for abandonment and not for compensation for the taking of their interests. This would be true if there were a bona fida abandonment. Obviously there was none. By first abandoning its original taking including all the lands and its subsequent retaking, the Territory attempts to deprive the tenants of an accrued right by a flimsy technicality . . .
>
> If we start with the indisputable proposition that improvements placed upon land become a part thereof, and the Territory instituted a proceeding to condemn "the lands of the Damon Tract adjacent to the airport," it became obligated to pay the full value thereof as of the date of the summons; this would include the improvements thereon.
>
> . . . . .
>
> Conceding that the government may, upon payment of just compensation, take less than the fee simple, in the present case it did not do so; in fact, very obviously it had no intention to take less than the fee simple. Under the resolution of the Hawaii Aeronautics Commission the attorney general was authorized and did bring a

[17] Justice Stainback was formerly United States District Attorney, United States District Judge for the District of Hawaii and Governor of the Territory of Hawaii. The Damon estate was one of the large estates to which his comment as to landholding in Hawaii referred. His comment that lessors "do not trust a jury as between landlord and tenant—and the Territory has joined with them by depositing with the court one dollar as the value of lessee's interest" is given meaning by the brief history of the Damon Tract set forth in Note 17 of Appendix I.

> suit to condemn "the lands of the Damon Tract adjacent to the airport, delineated on the map." It may not use a "device" to escape payment of just compensation, namely, the value of the land taken which included all improvements thereof.
>
> . . . . .
>
> As pointed out in case after case, the obligation of the government to pay "just compensation is not affected by how the "just compensation" may be divided between landlord and tenant (see cases supra). Any other construction would result in depriving tenants of the property without due process of law and would be a complete disregard of the equitable principles governing compensation in eminent domain. [Appendix II]

Petitioners' appeal raised the identical question decided adversely to them by the territorial supreme court in their mandamus action, the only difference being the procedural one that the appeal was taken from a final judgment determining they were entitled to no compensation. Why the court did not affirm the decision of its predecessor court rather than declining to reach the merits of the appeal can only be surmised. The same result was achieved as to petitioners when the court refused to decide their appeal because of the entry of a discontinuance following a judgment based upon its former determination that nothing was taken from petitioners under the amended complaint.

Petitioners sought rehearing on the ground there was no real abandonment of the condemnation of the land in which petitioners claimed an interest in the fee, but rather that a discontinuance was employed by the Territory instead of the appropriate judgment in condemnation limited to the interest of petitioners' lessors — as to whom the effect of either was identical — because the Territory hoped thereby to deprive petitioners of determination that an interest of theirs had, in fact, been taken, despite the exclusionary language of the second amended complaint. Petitioners further urged that the court's holding that petitioners' appeal was made

moot by a discontinuance by the trial court entered after the perfection of their appeal, without notice or opportunity to them to be heard, deprived them of procedural due process and the right to a forum in which to determine whether an interest of theirs in the land had been taken for which just compensation was required by the constitution to be paid. Rehearing was denied and judgment dismissing petitioners' appeal entered May 13, 1961. (R. pp. 28 and 33)

REASONS FOR GRANTING THE WRIT

This Court has never decided the important constitutional question of whether a sovereign, exercising the power of eminent domain, may take a fee in land from a lessor without paying just compensation to a lessee whose buildings are part of the land and whose value is destroyed by the taking. That a lessee's contract right to remove buildings at the end of his term does not inure to the benefit of the condemnor has long been regarded as settled by the decisions of lower federal courts and state courts and is treated as Horn-book by textwriters.[18]

In an opinion by Mr. Justice Holmes this court in *Duckett & Company v. United States*, 266 U.S. 14, 69 L. ed. 216,

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[18] *United States v. Seagren*, 50 F (2d) 333, 335 (C.A.D.C. 1931);
Nichols on Eminent Domain (2d Ed), Vol. 1, § 234;
Lewis on Eminent Domain, 3d ed., Vol. 2, p. 1276;
Jackson v. State, 213 N. Y. 34, 106 N.E. 758;
In re Appointment of Park Commissioners, 1 N.Y.S. 763;
In re New York 120 App. Div. 700, 105 N.Y.S. 779;
State v. Miller, 92 S.W. (2d) 1073, 1074;
St. Louis v. Senter Commission Co., 336 Mo. 820, 82 S.W. (2d) 87;
City of Larue v. St. Louis Public Service Co., 168 S.W. (2d) 966;
Minneapolis-St. Paul Metropolitan Airports Commission v. Hedberg-Freidheim Company, 226 Minn. 282, 32 N.W. (2d) 569;
Cumbaa v. Town of Geneva, 235 Ala. 423, 179 So. 227.
See also *Monongahela Navigation Company v. United States*, 148 U.S. 312, 37 L ed. 465; *Burkhart v. United States*, 210 F (2d) 602 and 227 F (2d) 659; *United States v. Honolulu Plantation Company*, 182 F (2d) 172, 174.

applied the just compensation requirement of the Fifth Amendment to a temporary appropriation without benefit of legal proceedings and required the federal government to pay a lessor the value of his leasehold which had been destroyed, despite a claim by the government that it had made an agreement with and paid the lessor for lessee's rights. Invoking as a comparison the taking of a fee, Mr. Justice Holmes wrote:

> Ordinarily an unqualified taking in fee by eminent domain takes all interests; and, as it takes the *res*, is not called upon to specify the interests that happen to exist. Whether or not for some purposes the new takers may be given the benefit of privity with the former holders, the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights . . . In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun. A right may be taken by simple destruction for public use.

In *United States v. General Motors*, 323 U.S. 373, 384 89 L. ed. 311, this court cited with approval as an apt analogy to the facts presented, *United States vs. Seagren*, 60 App. DC 183, 50 F. (2d) 333, a case on all fours with petitioners', and the leading circuit court of appeals decision upholding a lessee's right to compensation for buildings as an interest in the fee. In the *General Motors* case this court, in denying that the government could take temporary occupancy from a lessee of a portion of a long term lease and require the lessee to remove his fixtures, and yet pay only rent at the long term rate, said:

> If the Government need only pay the long-term rental of an empty building for a temporary taking from the long term tenant a way will have been found to defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the con-

templated public use requires the taking of the fee simple title. In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long term rental rate of an unoccupied building for the short term . . . And this, though the owner may be damaged by the ouster ten, a score or perhaps a hundred times the amount found due him as "fair rental value." . . . If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing "just compensation" into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of "value received" in that of contractual consideration.

In *Jackson v. State*, 213 N. Y. 34, 106 N. E. 758, Judge Cardozo upheld the right of an owner to be compensated for trade fixtures which were attached to the realty, saying:

> It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of second hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were to forfeit all these elements of value.

On September 13, 1957, the date of summons of the complaint to acquire the fee which, under territorial law, is the date as of which rights to compensation and amounts of compensation are determined, petitioners' buildings were part of the fee. They were part of the land when the Territory took possession of it on October 31, 1957, and the Territory never thereafter relinquished possession of the land in

fact. Only by a recital in the "voluntary discontinuance" it presented to the trial court on October 9, 1958 did the Territory "consent to the vacation of the order of possession." The trial judge ordered the discontinuance entered, reciting that the proceedings had already "been previously discontinued [sic]" as to petitioners by his former order permitting their interests and improvements to be excluded from the taking of the fee simple absolute title and granting judgment against them on the ground nothing was being taken from them. This judgment, which was then on appeal, was based on the territorial supreme court's decision in the mandamus action upholding the propriety of the amendment and characterizing it as an abandonment of condemnation as to petitioners. The circle was compassed when the state supreme court relied on the trial court's discontinuance as mooting petitioners' appeal making it unnecessary for it to decide the validity of the judgment against petitioners on which the subsequent discontinuance was based.

Separate settlements with lessors in *Duckett & Company v. United States*, *supra*, and *United States v. Seagren*, *supra*, were held not to satisfy Fifth Amendment claims of lessees for leaseholds or buildings which were part of the land. Yet by a series of procedural maneuvers petitioners' homes have been taken from them without just compensation and they have been left in no better position than the unfortunate squatters on the flooded battures of New Orleans.

Petitioners have been deprived of the security with which the Fifth Amendment surrounds the property of citizens by a judicial construction and course of conduct of the highest court of Hawaii which robbed the amendment of substance and reduced its quality to mere form and technicality. In the State of Hawaii, not yet freed from a semi-feudal land owning system, most of its home-owning citizens of all economic levels are lessees of their homes. To their insecurity as lessees has now been added the danger of losing, upon eminent domain, the benefit of provisions negotiated

for the protection of their investment in their homes. In this age of corrupted standards of public office, public officials, by merely choosing to reach settlements with large landowning estates or lessors, can reduce the rights of lessees to rubble. Home-owning lessees are not, however, the only class of threatened victims. The scythe here forged cuts a wider swath. Industrial and agricultural lessees can fall before it.

By selective language, by pulling back "the moving finger" and rubbing out events that happened and relabelling them the Territory contrived a device which the highest court of the State of Hawaii has held dispositive of petitioners' right to have their constitutional claim heard.

Petitioners urge a writ should be granted for the reason this court has never decided, and should decide, the constitutional issue which petitioners have set up and specially claimed in every court at every stage of every proceeding—in the territorial trial court, the territorial Supreme Court, the United States Court of Appeals and the Supreme Court of the State of Hawaii; for the reason petitioners have been denied a forum in state courts in which to enforce their rights; for the reason the question presented is an issue of importance to other lessees in the State of Hawaii, as well as petitioners, and important to all lessees everywhere; and for the reason that the refusal of the highest court of Hawaii to decide petitioners' claim leaves standing as binding precedent the decision against petitioners' rights to just compensation for their homes of its predecessor territorial court in the mandamus case which is probably in conflict with applicable, analogous decisions of this court, defining the scope of the basic protection given the property of citizens by the due process and just compensation clauses of the Fifth Amendment.

Respectfully submitted,

HARRIET BOUSLOG
Attorney for Petitioners

PROOF OF SERVICE

I, Harriet Bouslog, attorney for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of June, 1961 I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii by depositing the same in the United States Post Office in the City and County of Honolulu, State of Hawaii, addressed to its counsel of record as follows:

Shiro Kashiwa, Attorney General, Old Archives building Iolani Palace Grounds, Honolulu, Hawaii

Andrew S. O. Lee and Walter T. Shimoda, Deputy Attorneys General, Old Archives Building, Iolani Palace Grounds, Honolulu, Hawaii

John P. Russell, Special Deputy Attorney General c/o of Attorney General, State of Hawaii, Old Archives Building, Honolulu, Hawaii

HARRIET BOUSLOG
Attorney for Petitioners

Subject Index

	Page
Questions presented	2
Statutory provisions involved	2
Statement of the case	3
Argument	3
I. The record in this case does not present any question of taking of private property without paying just compensation in violation of the Fifth Amendment of the United States Constitution	3
II. The sovereign, pursuant to statute, may condemn a fee simple interest in land subject to an existing leasehold or holdover tenancy, including the lessee's or tenant's right to remove buildings and improvements thereon upon termination of lease	4
III. The sovereign, pursuant to statute, may wholly or partially abandon a condemnation proceeding	7
Conclusion	8

Table of Authorities Cited

Cases

	Pages
Akana, Application for Writ of Mandamus, 42 Haw. 415	3, 6, 7
Boston Chamber of Commerce v. Boston, 217 U.S. 189	3
Burkhart v. United States, 227 F. 2d 659	4, 5
Duckett & Co. v. United States, 266 U.S. 149, 69 L. Ed. 216	4, 6
Emerson v. City of Somerville, 166 Mass. 115, 44 N.E. 110	3
Jackson v. State, 213 N.Y 34, 106 N.E. 758	4, 6, 7
New York Telephone Co. v. United States, 136 F. 2d 87	4
United States v. General Motors Corp., 323 U.S. 373, 89 L. Ed. 310	4, 5
United States v. Seagren, 60 App. D.C. 183, 50 F. 2d 333	4, 5
United States v. Tavares Construction Co., 175 F. 2d 379	4

Statutes

Revised Laws of Hawaii 1955:	
Chapter 8	2, 6, 7
Section 5	2, 6
Section 25	7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No.

SAMUEL RENNY DAMON, HERMAN VON HOLT, DAVID HEBDEN PORTEUS, and JOHN EDWARD RUSSELL, Trustees under the will of SAMUEL M. DAMON, Deceased; LILLIAN TOM LOO, BEATRICE L. LUKE; KAN JUNG LUKE; FERMIN ABUCE; H. K. AHUNA; B. S. AKANA, et al.,

Petitioners,

vs.

TERRITORY OF HAWAII by HERBERT Y. C. CHOY, its Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

While we do not believe that any questions are presented in the state of the record herein, the petitioners have predicated certain points upon which the petition is based, and the respondent must necessarily adapt itself to answer them. Briefly stated, as they appear to the respondent's analysis, these points are:

1. Does the Fifth Amendment of the Constitution of the United States prevent the Territory of Hawaii (State), pursuant to an order of the Territorial trial court allowing amendments to a condemnation complaint, from condemning the fee simple absolute estate of lessors and their reversionary rights, exclusive of lessees' interests and buildings which lessees own and or have a right to remove under the terms of their lease?

2. Does the Fifth Amendment prevent the Territory of Hawaii (State) from wholly or partially abandoning a condemnation proceeding prior to final judgment?

STATUTORY PROVISIONS INVOLVED

Chapter 8, Revised Laws of Hawaii 1955, as amended, section 8-5: "Fee simple or lesser estate may be acquired. In the taking of private property for a public use, a fee simple estate or any lesser estate may be acquired."

STATEMENT OF THE CASE

In addition to the statements presented by petitioners, the respondents submit that at the time of the filing of the original condemnation complaint the original term of lease of petitioners had expired and they were under a quarterly tenancy (3 months' term) subject to termination upon the giving of thirty (30) days' written notice prior to the expiration of any extended quarterly term. (App. II to Petition, p. 33). Never during the entire proceedings in condemnation was the Territory of Hawaii (State) ever in physical possession of any of the petitioners' premises nor were any of the petitioners ousted from possession.

ARGUMENT

I

THE RECORD IN THIS CASE DOES NOT PRESENT ANY QUESTION OF TAKING OF PRIVATE PROPERTY WITHOUT PAYING JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The protection accorded under the Fifth Amendment of the Constitution of the United States is that private property shall not be taken for public use without just compensation. Where there is no taking, compensation need not be made. Re *Akana, Application for Writ of Mandamus* (App. II to Petition, p. 42); *Emerson v. City of Somerville*, 166 Mass. 115, 44 N.E. 110. And the question is what has the owner lost, not what has the taker gained. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195.

II

THE SOVEREIGN, PURSUANT TO STATUTE, MAY CONDEMN A FEE SIMPLE INTEREST IN LAND SUBJECT TO AN EXISTING LEASEHOLD OR HOLDOVER TENANCY, INCLUDING THE LESSEE'S OR TENANT'S RIGHT TO REMOVE BUILDINGS AND IMPROVEMENTS THEREON UPON TERMINATION OF LEASE.

The courts of the various jurisdictions have consistently held that a fee simple estate may be condemned subject to any lesser interest therein. *New York Telephone Co. v. United States,* 136 F. 2d 87 (2d Cir.), a taking of the fee subject to existing public utility easements; and *United States v. Tavares Construction Co.,* 175 F.2d 379 (9th Cir.), a taking of the fee subject to a lease. The petitioners have been persistent in citing various cases as authorities holding that lessees of land under condemnation have a right to compensation for buildings and improvements thereon as an interest in the fee but have neglected to distinguish these cases cited as involving cases where the condemner seeks to condemn the entire fee simple interest including improvements thereon without reservation or only a leasehold interest including the buildings. Typical of these cases cited are *United States v. General Motors Corp.,* 323 U.S. 373, 384, 89 L. Ed. 310 (Pet. p. 5); *United States v. Seagren,* 60 App. D.C. 183, 50 F.2d 333; *Jackson v. State,* 213 N.Y. 34, 106 N.E. 758; *Duckett & Co. v. United States,* 266 U.S. 149, 69 L.Ed. 216; *Burkhart v. United States,* 227 F.2d 659 (9th Cir.).

The *General Motors* case is not apt as authority for the petitioners' contention on the ground that it

involved a condemnation of a leasehold interest, unlike the case at bar where the leaseholders were excluded from the taking. The issue on appeal in that case was whether market value of the temporary interest condemned should be confined to a vacant building or a building fully equipped. Also there, it involved a question of the tenant's right to be compensated for damages to fixtures and equipment, and the removal and storage of same since it was an unusual case. It is the contention of the respondent that the *General Motors* case sustains the position of the respondent in that compensation need only be paid for what is taken. The court said:

> "In the light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken." (323 U.S. 379).

So also, *United States v. Seagren,* supra, may be distinguished from the instant case because in that case the condemner condemned the fee simple interest together with the leasehold and the right of the lessee to remove the buildings thereon; whereas in the case at bar the leasehold of the petitioners and the respective rights to remove the buildings under the terms of the lease have been expressly excluded from the taking pursuant to the amendment to the Amended Complaint allowed by the trial court. And so is *Burkhart v. United States,* supra, distinguished from the case at bar.

Jackson v. State, supra, involved an unqualified taking, whereas in the instant case the taking is subject to the interest of the leasehold. The court said in the *Jackson* case:

> "An appropriation of land, *unless qualified when made,* is an appropriation of all that is annexed to the land whether classified as buildings or as fixtures. . . ." (106 N.E. 758) (Emphasis ours)

The above quoted excerpt implies that under a qualified taking the lessor's interest subject to outstanding leasehold may be taken. The issue in the *Jackson* case was whether or not certain fixtures were part of the buildings and hence compensable under our Constitution. There the condemner sought to condemn the land, the leasehold interest and the buildings, however sought to avoid payment for certain fixtures.

Duckett & Co. v. United States involved condemnation for a temporary use of a certain bus terminal and pier facility. This court sustained the claim of the lessee of the owner for compensation for the unexpired term of its lease because the leasehold was taken.

Section 8-5, Revised Laws of Hawaii 1955, permits the condemnation of a fee simple estate subject to an existing tenancy. The statute was so construed in the case at bar. Re *Akana, Application for Writ of Mandamus,* 42 Haw. 415, 425 (App. II to Petition, p. 41).

Courts have consistently held that a condemnation proceeding is analogous to a forced sale.

> "'Condemnation' is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined." (*Jackson* case, supra, 106 N.E. 758)

And this theory of condemnation is supported by the Supreme Court of Hawaii in the instant case: Re *Akana, Application for Writ of Mandamus,* 42 Haw. 415, 436, 437 (App. II to Petition, pp. 52, 53).

III

THE SOVEREIGN, PURSUANT TO STATUTE, MAY WHOLLY OR PARTIALLY ABANDON A CONDEMNATION PROCEEDING.

The respondent may exclude the petitioners' leasehold interests and the buildings they own and have the right to remove, after it once included them in the scope of the taking. This is implicit in the statutes of the State under section 8-25, Revised Laws of Hawaii 1955, which allows damages upon abandonment of proceedings "before reaching final judgment." The statute was so construed in the case at bar. Re *Akana, Application for Writ of Mandamus,* 42 Haw. 415, 426, 427 (App. II to Petition, pp. 42, 43; App. I to Petition, note 2, p. 9).

Because of the exclusion of the leasehold interests of petitioners by the order amending the amended complaint on February 19, 1958 (App. I to Petition, note 9), petitioners were not entitled to notice of the discontinuance of the proceedings filed against the

fee simple owners and the order entered pursuant thereto. (App. I to Petition, note 2, p. 8.)

CONCLUSION

In summary, we submit that petitioners have entirely failed to show any taking of their leasehold interests in the condemnation proceeding and no property of the petitioner having been condemned the petitioners are not entitled to any compensation except for damages, if any, for abandonment of the condemnation proceedings.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated, Honolulu, Hawaii,
June 27, 1961.

SHIRO KASHIWA
Attorney General
ANDREW S. O. LEE
Deputy Attorney General
WILBUR K. WATKINS, JR.
Special Deputy Attorney General
Attorneys for Respondent.